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Reinforcing Refugee Protection in the Wake of the War on Terror

Edwin Odhiambo-Abuya

[pages 277–330]

Abstract: This Article examines how the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) can be used as a practical tool to enhance the protection of persons who have fled their home States in search of asylum in the wake of the global “war on terror.” It compares and contrasts provisions of CAT to similar provisions contained in international refugee law. This Article contends that, in some respects, the protection provisions of CAT are wider than those found in international refugee law, and, in other respects, narrower than those found in international refugee law. It concludes by suggesting strategies for meeting the challenges ahead.

Settlement of Disputes Under the Central America–Dominican Republic–United States Free Trade Agreement

David A. Gantz

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Abstract: The Central America–Dominican Republic–United States Free Trade Agreement (CAFTA-DR) is one of nearly a dozen post-North American Free Trade Agreements (NAFTA) free trade agreements (FTAs) that the United States has concluded with nations in Latin America, the Middle East, and Asia since 2000. All of these newer agreements are based on NAFTA, but they differ in significant respects, particularly in the chapters relating to dispute settlement. Most significantly, the changes reflect U.S. government experience with NAFTA dispute settlement, particularly with regard to actions brought by private investors against the United States and other NAFTA governments under NAFTA's investment protection provisions (Chapter 11). However, the changes also result from perceived (as well as actual) threats to U.S. sovereignty, as reflected in the President's Trade Promotion Authority of 2002. It is too soon to determine whether
these changes will have a significant impact on dispute settlement under CAFTA-DR; some may well lead tribunals to conclusions different from those that would be rendered under NAFTA. Government-to-government dispute settlement proceedings under CAFTA-DR, as under NAFTA, are likely to be infrequent unless the roster is promptly appointed.

CLIMATE CHANGE AND TAX POLICY

Christina K. Harper

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Abstract: Scientific evidence suggests that man-made greenhouse gas (GHG) emissions, especially carbon dioxide emissions, are a contributing factor to global climate change. This global climate change negatively impacts our Earth and policymakers must implement climate change policies in an effort to decrease carbon emission and mitigate its negative impacts. This Article will analyze three options for regulating GHG emissions: traditional command-and-control regulation, tradable permit markets, and taxes. Following a detailed analysis of both the theoretical and practical arguments regarding carbon taxation and alternative emissions permit trading schemes, this Article concludes that carbon taxation is the superior method of reducing carbon emissions.

NOTES

ANTARCTICA’S FROZEN TERRITORIAL CLAIMS: A MELTDOWN PROPOSAL

Jill Grob

[pages 461–484]

Abstract: Antarctica has been a site of peace and scientific exploration for the last fifty years, largely due to a series of agreements known collectively as the Antarctic Treaty System (ATS). But the continent is not free from potential conflicts. A key compromise for ATS parties was the “freezing” of various countries’ territorial claims. However, these territorial claims did not go away, but merely remained hidden beneath the surface of future policies. The author argues that continued suppression of these claims will not further ATS party goals for Antarctica: peace, no military activity, and scientific inquiry. Since many countries rely on oil for their energy needs, Antarctica may become more desirable for commercial exploitation if current sources become too expensive. Therefore, latent territorial claims could seriously undermine continued compromise by ATS parties. Regrettably and unnecessarily, the environment, scientific advances, and international peace would all be placed at great risk.
Money Talks: Putting the Bite in Participatory Rights Through International Financial Assistance

Daniel Navisky

Abstract: Democratic elections are one of the foundational elements of a stable, healthy, and vibrant modern state. Current treaty law guarantees four basic participatory rights: periodic and regular elections, universal suffrage, secret ballots, and non-discrimination. Those rights are bolstered further through United Nations election monitoring and state practice. This Note argues that more must be done to guarantee true participatory rights in emerging and lesser developed nations. In particular, it proposes attaching conditions to World Bank funding that require adherence to the rights guaranteed under global and regional treaty law and the customary practice of states and international actors. In order to accomplish this goal, compliance with those conditions should be measured through United Nations monitoring reports.

Criminalizing War: Toward a Justifiable Crime of Aggression

Michael O’Donovan

Abstract: State parties to the International Criminal Court made history in 1998 when they agreed to include the crime of aggression as one of four crimes within the jurisdiction of the Court. The crime, however, was left undefined in 1998, and the Court’s jurisdiction over the crime of aggression has been postponed until state parties can agree to a definition at a Review Conference in 2009. Reaching such an agreement would represent the first time in history that national leaders would be bound by a specifically defined crime of international aggression with sanctions wielded by an international court. Parties to the Court, however, differ widely over two questions: whether the crime should be defined narrowly or broadly, and who should decide when aggression has occurred, thus triggering the Court’s jurisdiction over the culpable individuals. The two questions have largely split state parties between those citing the demands of the current international system and those committed to basic principles of fairness. This Note suggests that by applying the traditional utilitarian and retributivist rationales for the criminal law, state parties may be able to reach the most balanced and principled definition of aggression.
Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Expression in a Connected World

Christopher Stevenson

[pages 531–558]

Abstract: In the final days of 2005, Microsoft Corporation made international headlines when it removed the site of a Beijing researcher from its blog hosting service. Soon, other instances of U.S. companies assisting in China’s internet censorship emerged. These revelations generated outrage among commentators and legislators and led to calls for action. This Note examines the methods of internet censorship employed by China and other nations, and explores the assistance that U.S. companies have provided to these nations. It analyzes the liability issues facing these companies in light of existing case law and statutory solutions proposed in the U.S. Congress. It then proposes a novel combination of existing legislative proposals, recommendations from the Electronic Frontier Foundation, and international cooperation as the best way to address the problem of internet censorship.
REINFORCING REFUGEE PROTECTION IN THE WAKE OF THE WAR ON TERROR

Edwin Odhiambo-Abuya*

Abstract: This Article examines how the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) can be used as a practical tool to enhance the protection of persons who have fled their home States in search of asylum in the wake of the global “war on terror.” It compares and contrasts provisions of CAT to similar provisions contained in international refugee law. This Article contends that, in some respects, the protection provisions of CAT are wider than those found in international refugee law, and, in other respects, narrower than those found in international refugee law. It concludes by suggesting strategies for meeting the challenges ahead.

[I was] arrested by [Government] security forces [and] raped in [my] home in front of [my] children. . . . [I] was brutally beaten . . . [I] was taken to Makal prison in Kinshasa. . . . [I] was not to receive any visits and shared a cell of 3 by 6 metres with seven other inmates. There were no proper sanitary provisions and [we] had to urinate on the floor. Every morning guards came into the cell and forced [us] to dance, [they] beat . . . and sometimes raped [us]. [I] was raped more than 10 times . . . . [I] was regularly beaten, sometimes with whips made of tyres on which metal thread was stuck. [I] was burnt with cigarettes on the inside of [my] thighs and struck with batons. [I] was detained for one year without trial. [Eventually] with the assistance of one of the supervisors of the prison who had been bribed by [my] sister, [I] managed to escape [and fled overseas to seek asylum as a refugee].

—Pauline Kisoki

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INTRODUCTION

Many individuals such as Pauline Kisoki\(^1\) are increasingly forced to seek sanctuary in other States because of beatings and other brutal acts at the hands of the State, State-sponsored agents, or militia members, which often constitute torture or cruel, inhuman, or degrading treatment. According to Bent Sorensen, the former Vice-Chairperson of the Committee Against Torture (Torture Committee), a “considerable numbers of refugees have been subjected to torture.”\(^2\) Hard evidence collected in Kenya,\(^3\) Macedonia,\(^4\) East Timor,\(^5\) and Afghanistan\(^6\) corroborates this position. This evidence substantiates the thesis that torture is one of the leading triggers that forces people to flee their home States in search of protection elsewhere as refugees. Yet the definition of “refugee” in the 1951 United Nations (U.N.) Convention Relating to the Status of Refugees\(^7\) (Refugee Convention) is narrow because it excludes from protection those who have been forced to flee their home States because of the threat of torture. To qualify for asylum, the Refugee Convention requires an applicant to prove that he or she has a well founded fear of persecution in his or her home State based on race, religion, nationality, membership of a particular social group, or political opinion. According to Article 1(A)(2) of the Convention, “refugee” means any person who:

\[
\text{[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his na-}
\]


\(^3\) In a recent survey that the author conducted on Kenya’s refugee status determination regime (2002–2003), more than half of the refugees and asylum seekers who participated in the project claimed they had suffered from acts that would constitute torture or cruel, inhuman, or degrading treatment. See generally Edwin Odhiambo-Abuya, United Nations High Commissioner for Refugees and Status Determination Inttaxaan in Kenya: An Empirical Survey, 48 J. Afr. L. 187 (2004) (for the results of the field study).


tionality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{8}

The growing number of incidents of torture occurring globally, coupled with the lack of provisions in international refugee law to protect victims of torture, necessitates an appropriate legal response by this corpus of law. If appropriate measures are not taken, there is a high risk that asylum seekers fleeing torture will remain in limbo. Protection of these specific forced migrants is especially important now that we are living in a world of terror where fear of the “other” and threats of war and insecurity are more imminent than before. In addition, it is likely that many host States will continue to deny entry and support to even the most genuine of cases.\textsuperscript{9} Since September 2001 and the ensuing global fight against terrorism, substantial restrictions have been placed on those seeking asylum as refugees. Asylum seekers have been “redefined as agents of insecurity” and “even as a potential source of armed terror.”\textsuperscript{10}

The purpose of this Article is not to address views on the use of torture.\textsuperscript{11} Rather, this Article evaluates the Convention Against Torture

\textsuperscript{8} Id.


and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\textsuperscript{12} and the extent to which the treaty can reinforce the international refugee protection regime in the wake of the so-called global “war on terrorism.” This Article contends that, notwithstanding increased security concerns across the world, States are still duty-bound to respect their international human rights obligations. In order to meet the contemporary needs of persons displaced by torture, the term “refugee” needs to be interpreted in a manner that is likely to realize this objective. Put another way, this Article advocates a liberal rather than a narrow approach to defining the term “refugee.” International refugee law supports this liberal position. Recognizing the principle of universality of human rights, the preamble of the Refugee Convention provides that the overall objective of international refugee protection is to “assure” forced migrants “the widest possible exercise of . . . fundamental rights and freedoms” espoused by the Universal Declaration of Human Rights (UDHR).\textsuperscript{13} This approach is consistent with the Vienna Convention on the Law of Treaties (Vienna Convention),\textsuperscript{14} which requires States to interpret any treaty “in good faith” and “in the light of its object and purpose.”\textsuperscript{15} Additionally, States are required under the terms of the \textit{pacta sunt servanda}\textsuperscript{16} rule to perform their obligations in “good faith.”\textsuperscript{17}

Section I examines key provisions of CAT that seek to protect asylum seekers. In Sections II and III, this Article compares and contrasts the protection regime of CAT to that of the Refugee Convention. These Sections further evaluate issues surrounding: (1) the scope of protection; (2) protected persons; (3) the \textit{non-refoulement} concept; (4) relief under the international refugee and torture frameworks; (5) the evidentiary threshold; (6) perpetrators of acts that cause flight; (7) the application process; and (8) enforcement mechanisms provided for by these legal instruments. This Article contends that while certain protection

\begin{flushleft}
\begin{enumerate}
\item Id. art. 31.
\item \textit{See Concise Australian Legal Dictionary} 323 (2d ed. 1998) (\textit{pacta sunt servanda} is a “fundamental principle of international law that treaties concluded properly are to be observed”).
\item Vienna Convention, \textit{supra} note 14, art. 26.
\end{enumerate}
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provisions of CAT are wider than those in refugee treaties, certain provisions of CAT are narrower than those found in refugee treaties. The Article concludes by suggesting strategies for meeting the challenges ahead.

I. Key Provisions of CAT

On December 10, 1984, at the thirty-sixth anniversary of the UDHR, the U.N. General Assembly unanimously adopted CAT. CAT was designed to globally combat incidents of torture.\textsuperscript{18} Earlier, on December 9, 1975, the international community adopted a non-binding Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Declaration).\textsuperscript{19} CAT is a multilateral treaty, guided by the Torture Declaration, which came into operation almost two and a half years after its adoption on June 26, 1987. As of January 1, 2006, 141 States were party to CAT.\textsuperscript{20} While CAT recognizes the already existing prohibition against torture in international human rights law as proclaimed in the UDHR\textsuperscript{21} and the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{22} it was adopted to reinforce this prohibition. Consequently, the preamble to CAT states that the purpose of the treaty is to contribute to the “struggle against torture and other cruel, inhuman, or degrading treatment or punishment.”\textsuperscript{23}

With regard to its international supervisory mandate, the Torture Committee, the implementing body of CAT, discharges its function in four different ways. Article 19 requires State Parties to submit periodic reports to the Committee detailing the “measures they have taken to give effect to their undertakings under” the provisions of CAT. After studying a report of this kind, the Torture Committee makes its suggestions or comments and transmits them to the relevant State Party, which is at liberty to respond.\textsuperscript{24} The Committee is also empowered to investigate, upon

\textsuperscript{18} The preamble to CAT underscores the treaty’s desirability “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” CAT, \textit{supra} note 12, pmbl.


\textsuperscript{21} CAT, \textit{supra} note 12, pmbl.


\textsuperscript{23} CAT, \textit{supra} note 12, pmbl.

\textsuperscript{24} \textit{Id.} arts. 19(3), 19(4).
receipt of “reliable information,” incidents of torture in the territory of a State Party.\textsuperscript{25} Moreover, the Torture Committee may receive and consider communications from one State Party regarding incidents of torture in another State Party.\textsuperscript{26} Lastly, the Torture Committee also has a mandate to receive and consider communications from individuals, such as asylum seekers, concerning claims of torture that occur in the territory of Member States.\textsuperscript{27}

Ten experts constitute the Torture Committee.\textsuperscript{28} Ten members was considered sufficient because the subject matter to be dealt with by the Committee is more specific than the wide range of problems that other committees such as the Human Rights Committee have to handle.\textsuperscript{29} The experts are elected by secret ballot from a list of persons submitted by Member States.\textsuperscript{30} Each member, however, is required to possess “high moral standing” and “recognized competence” in the area of human rights.\textsuperscript{31} Further, the experts, who are appointed for a term of four years,\textsuperscript{32} are required to serve in their “personal capacity.”\textsuperscript{33} This implies that they are expected to act independently or as members based on their own knowledge, experience, and judgment and that they shall not act on behalf of the government that nominated them, or on behalf of the country of their nationality.\textsuperscript{34}

A. The Definition of Torture and Establishing Torture

1. Definition of Torture

In common parlance, “torture” refers to the “infliction of severe pain especially as a punishment or for the purpose of persuasion.”\textsuperscript{35} The legal definition of torture embodies a higher threshold. In the realm of law, for a person to claim that he or she has been a victim of torture,
evidence over and above that of being subjected to severe pain must be adduced. Although both the ICCPR and UDHR clearly prohibit torture, neither treaty attempts to define the meaning of the term. In contrast, Article 1 of CAT specifically and comprehensively defines the international crime of torture:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him or a third person for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.\(^{36}\)

This definition virtually mirrors the definition of torture contained in Article 1 of the 1975 Torture Declaration:

1. [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.\(^{37}\)

2. Establishing Torture

Four stringent elements are needed to establish torture under CAT. First, a person must demonstrate that the act at issue is more likely than not to cause severe mental or physical pain or suffering.\(^{38}\)

\(^{36}\) CAT, supra note 12, art. 1.

\(^{37}\) G.A. Res. 3452 (XXX), supra note 19, art. 1.

\(^{38}\) CAT, supra note 12, art. 1.
He or she must also demonstrate that the alleged act was committed intentionally.\textsuperscript{39} Third, the perpetrator of the act must be a public official acting directly or through a duly appointed representative.\textsuperscript{40} Lastly, the act must be unlawful.\textsuperscript{41}

\textbf{a. Severe Mental or Physical Suffering}

A person must first establish that the alleged torturous act is more likely than not to cause severe mental or physical pain or suffering.\textsuperscript{42} As is the case with many international treaties, CAT makes broad provisions, and, in particular, fails to provide examples of acts that would constitute torture.\textsuperscript{43} Nonetheless, emerging jurisprudence from the U.N. Torture Committee has attempted to fill this gap.\textsuperscript{44} In its first report issued in 1986, the U.N. Special Rapporteur gave examples of acts that could constitute physical and mental torture.\textsuperscript{45} The report stated that beatings, burns (from cigarettes, electricity, burning coal), electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual aggression, administration of drugs (causing vomiting, asphyxia, trembling, etc.), prolonged denial of sleep, food, sufficient hygiene, and/or medical assistance, threats to kill, and the disappearance of relatives all constituted physical or mental torture.\textsuperscript{46} This list is somewhat consistent with jurisprudence from the Torture Committee, which establishes that beatings,\textsuperscript{47} death threats,\textsuperscript{48} burning and destruction of property,\textsuperscript{49} sleep deprivation,\textsuperscript{50} rape,\textsuperscript{51} subjection to electric shocks,\textsuperscript{52} etc.

\textsuperscript{39} Id.  
\textsuperscript{40} Id.  
\textsuperscript{41} Id.  
\textsuperscript{42} Id.  
\textsuperscript{43} See generally CAT, supra note 12.  
\textsuperscript{44} Id. art. 17 (establishing the Torture Committee and charging it with the responsibility for implementing CAT).  
\textsuperscript{46} Id.  
and submergence in ice could be construed as severe physical or mental torture.

The test of what would amount to severe pain or suffering appears to be subjective and each case is assessed on its own merits. As is the case in civil and criminal law, medical evidence and expertise is marshalled to prove the mental or physical aspects of each claim. This form of evidence helps to guide a court or tribunal in their efforts to reach a finding, especially in situations where an adjudicating body lacks the necessary knowledge or skill relating to particular aspects of the evidence. In the context of CAT, this principle was affirmed in G.R.B. v Sweden where the Torture Committee found that the medical evidence presented by the applicant supported her claim that she suffered “severely from post-traumatic stress disorder, most probably as the consequence of the abuse” she had earlier suffered at the hands of military forces in her home State.

In addition, a person must prove that the suffering they claim to have undergone was severe. Herman Burgers and Hans Danelius, two key participants in the drafting of CAT, state that “alternative wordings, such as extreme or extremely severe pain were suggested during the travaux préparatoires [drafting history], but the phrase ‘severe pain’ was considered sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture.” Few would deny that it is difficult to articulate with mathematical precision


\[55\] See, e.g., sections 45 and 48 of the Indian and Kenyan Evidence Acts respectively. Section 45 of the Indian Evidence Act defines expert as any person who is “specially skilled” in “foreign law, science or art or in questions as to identity of handwriting or finger impressions.” Evidence Act, No. 1 (1872) (India). Section 48(1) of the Kenyan Evidence Act provides that an expert is a person who is “specially skilled” in “foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.” Evidence Act, Laws of Kenya, CAP. 80 § 48(1) (1989).


\[57\] CAT, supra note 12, art. 1.

\[58\] Burgers & Danelius, supra note 29, at 117.
what amounts to severe pain or suffering. As a result, each case is evaluated on its own circumstances. However, it should be noted that torture can arise from a single act that may not, in and of itself, be classified as extremely severe.

b. Objectives of the Perpetrator

The second requirement refers to the objectives of the perpetrator of an act.\(^{59}\) Article 1 of CAT requires a victim to prove that the act was intentionally designed to obtain “information or a confession,” or to intimidate, coerce, discriminate, or punish the victim (or a third person) for an act committed or suspected to have been committed by the victim or a third person. Since the act in issue must be intentionally performed, it follows that accidents or negligent acts that cause pain and suffering do not qualify as torture. Because the phrase “for such purposes as” precedes the list of objectives, the list is illustrative and not exclusive.\(^{60}\) It is notable that Article 1 of the Torture Declaration employs similar wording. Therefore, as new cases of alleged torture arise, other objectives may be included in that category. Even then, the words “such as” imply that unlisted purposes must have something in common with the purposes expressly listed.

c. The Perpetrator

According to the drafting history of CAT, the definition of torture was the subject of lengthy debates and negotiations. A number of opinions were expressed concerning the status of perpetrators of acts alleged to constitute torture. The French delegation argued that “the definition of the act of torture should be a definition of the intrinsic nature of the act or torture itself, irrespective of the status of the perpetrator.”\(^{61}\) This position failed to attract support. Most States, however, did agree that CAT should apply to “acts committed by public officials” and to acts for which those public officials “could otherwise be considered to have some responsibility.”\(^{62}\) The U.K. delegation suggested that the definition of perpetrator should be broadened to cover a “public official or any other agent of the State.”\(^{63}\) The delegation of the Federal

\(^{59}\) CAT, supra note 12, art. 1.

\(^{60}\) Id.

\(^{61}\) Burgers & Danelius, supra note 29, at 45.

\(^{62}\) Id.

\(^{63}\) Id.
Republic of Germany suggested a much broader definition for public official:

Not only to persons, who, regardless of their legal status, have been assigned public authority by state organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold or exercise authority over others and whose authority is comparable to government authority or—be it only temporarily—has replaced government authority or whose authority has been derived from such persons.\textsuperscript{64}

Ultimately, it was agreed that the perpetrator of the act should be a public official acting directly or through a duly appointed delegate or agent. Accordingly, CAT applies not only to acts that are directly carried out by governmental officials, but also to acts that such officials incidentally perform, as well as to acts of others that they tolerate or condone.\textsuperscript{65} This definition is broader than that of the Torture Declaration, which limits torture to acts committed by or at the instigation of public officials.\textsuperscript{66}

Article 16 of CAT requires State Parties to undertake measures that will prevent acts of torture “committed by or at the instigation of or with consent or acquiescence of a public official or any other person acting in an official capacity.”\textsuperscript{67} This provision imports a substantial amount of government control within the ambit of the act that is claimed to constitute torture. The requirement is consistent with the primary aim of the treaty, namely to reduce instances of torture “throughout the world” by States or their agents.\textsuperscript{68} The intention of the wording is to distinguish between official and private acts. As such, CAT excludes acts of abuse committed by opponents of the government, such as acts committed by militia, paramilitary, insurgents, guerrillas, and rebel groups. Thus in \textit{G.R.B. v. Sweden}\textsuperscript{69} and \textit{S.V. v. Canada},\textsuperscript{70} the Torture Committee argued that allegations of torture at the hands of guerrilla groups, namely, \textit{Sendero Luminoso} and Liberation Tigers of

\begin{itemize}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{See generally} CAT, \textit{supra} note 12.
\item \textsuperscript{66} G.A. Res. 3452 (XXX), \textit{supra} note 19, art. 1.
\item \textsuperscript{67} CAT, \textit{supra} note 12, art. 16.
\item \textsuperscript{68} \textit{See id.} pmbl.
\item \textsuperscript{69} \textit{G.R.B.}, CAT/C/31/D/189/2001, ¶ 7.
\end{itemize}
Tamil Elam (LTTE) respectively, fell outside the scope of the treaty. In both applications, the Torture Committee emphasized this difference:

The issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of [CAT].

Accordingly, it concluded in S.V.: “[T]he issue, on which the authors base part of their claim that they would suffer torture by LTTE or other non-governmental entities on return to Sri Lanka, cannot be considered by the Committee.”

It would be unrealistic to require States to be accountable for acts solely committed by private actors. The rationale for this omission is based on the argument that these acts can be prosecuted via the national criminal justice system. It is unreasonable to assume, however, that acts committed by State-controlled or State-supported vigilante, death squads, or paramilitary groups will be prosecuted domestically.

In terms of proof, it is insufficient to show that a non-State actor committed an act. The test is whether the State abstained from or was unwilling to control those individuals or groups so that their actions can be “regarded as acts of the State rather than acts of private individuals.” Accordingly, a person must additionally establish that the State ignored the commission of the alleged act in question. The victim must demonstrate that a public official was aware of the commission of the torturous act and abstained from acting, thereby breaching a legal obligation to intervene. The question of whether a government is unwilling to intervene is an evidentiary issue. As Hajrizi Dzemajl et al. v. Yugoslavia demonstrates, it is independent of the number of instances that a State is alleged to have failed to act.

The phrase “with the consent or acquiescence” does not appear in the Torture Declaration and was only added to the international

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71 Id. ¶ 9.5; G.R.B., CAT/C/31/D/189/2001, ¶ 6.5.
74 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW 550 (9th ed. 1996).
76 CAT, supra note 12, art. 1.
human rights framework with the adoption of CAT. A person is generally said to acquiesce to an act when he or she willingly fails to take action to prevent its commission.\footnote{See Black’s Law Dictionary 25 (8th ed. 2004) (“acquiescence” means “implied consent to an act”).} The Torture Committee examined this issue in \textit{Dzemajl}.\footnote{See generally \textit{Dzemajl}, CAT/C/29/D/161/2000.} In April 1995, a report was lodged at the Danilovgrad Police Department alleging that two Romani minors had raped a Montenegrin girl, S.B.\footnote{\textit{Id.} ¶ 2.1.} About 200 Montenegrins, led by the girl’s family, marched to the police station and called for the expulsion of all Roma from Danilovgrad.\footnote{\textit{Id.} ¶ 2.2.} They threatened to exterminate and burn down Roma houses.\footnote{\textit{Id.}} Quite apart from attempting to quell the tension, the police responded by ordering the Romani residents to evacuate the settlement immediately as they were at risk of being lynched by the Montenegrins.\footnote{\textit{Id.} ¶ 2.4.} Although most fled to a neighboring region, the applicants remained to safeguard their homes and livestock.\footnote{\textit{Id.}} Later the police informed them that “no one could guarantee their safety or provide them with protection.”\footnote{\textit{Id.} ¶ 2.4.} Undisputed facts established that the Montenegrins razed the entire Roma settlement later that night.\footnote{\textit{Id.} ¶ 2.7.} They looted valuables and slaughtered cattle.\footnote{\textit{Id.} ¶ 2.8.} Police officers present at the scene failed to stop the anarchy.\footnote{\textit{Id.} ¶ 2.12.} Rather, they “simply moved their police car to a safe distance.”\footnote{\textit{Dzemajl}, CAT/C/29/D/161/2000, ¶ 2.4.} The applicants claimed that the officers did no more than feebly seek to persuade some of the attackers to calm down.\footnote{\textit{Id.} ¶ 2.9.} The authorities did ensure, however, that the violence and destruction of property was limited to the Roma settlement.\footnote{\textit{Id.} ¶ 2.9.}

Hajrizi and sixty-four other persons, all of Romani origin and nationals of the Federal Republic of Yugoslavia, brought a claim alleging that the State was in breach of, among others, Articles 1 and 16 of CAT. Finding in their favor, the Torture Committee held that the burning and destruction of property constituted cruel, inhuman, or degrading
treatment or punishment.\textsuperscript{91} It also found that the police acquiesced to the unlawful acts as they failed to check the violent evictions and destruction of livelihoods:

The complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying “acquiescence.”\textsuperscript{92}

In their separate concurring opinion, Mr. Fernando Marino and Mr. Alejandro Poblete argued that the applicants had suffered torture because:

(a) The[y] . . . were forced to abandon their homes in haste given the risk of severe personal and material harm;
(b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;
(c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;
(d) Thus displaced and wronged, the[y] ha[d] still not received any compensation, seven years after the fact, although they have approached the domestic authorities;
(e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection.\textsuperscript{93}

Where State authority is wholly lacking, such as where the central government has collapsed, acts by groups exercising quasi-governmental powers have been found to satisfy the public official requirement and thus activate Article 3, the \textit{non refoulement} obligation. As such, acts of groups exercising \textit{de facto} prerogatives of the government fall within CAT. The Torture Committee addressed this principle in \textit{Sadiq Elmi v. Australia}\textsuperscript{94} and \textit{H.M.H.I. v. Australia}.\textsuperscript{95} In \textit{Elmi}, the applicant, a Somali

\textsuperscript{91} \textit{Id.} ¶ 9.2.
\textsuperscript{92} \textit{Id.} ¶ 9.
\textsuperscript{94} See generally \textit{Elmi}, CAT/C/22/D/120/1998.
national, fled to Australia following the 1991 civil conflict in Somalia. A case officer from the Department of Immigration and Multicultural Affairs, acting as a delegate for the Minister of Immigration and Multicultural Affairs (Immigration Minister), rejected Elmi’s application for a protection visa and thus denied him refugee status. The Refugee Review Tribunal (RRT) affirmed this decision. A single judge of the Federal Court and a Full Court of the Federal Court dismissed subsequent appeals for review of the RRT’s decision. Subsequently, Elmi lodged an application for the grant of a protection visa based on “compassionate” grounds with the Immigration Minister. The Minister refused to grant him a protection visa, and Elmi became subject to deportation. Subsequently, Elmi lodged an application for the grant of a protection visa based on “compassionate” grounds with the Immigration Minister. The Minister refused to grant him a protection visa, and Elmi became subject to deportation. Having exhausted the domestic legal framework, Elmi submitted an application to the Torture Committee arguing that his expulsion would constitute a violation by Australia of Article 3 of CAT. He further claimed that his background and clan membership would render him personally at risk of being subjected to torture.

At the time that Elmi lodged his application, Somalia lacked a central government. In place were various armed clans that had control over different parts of the country. One of the central issues before the Torture Committee was whether Elmi would be subjected to torture at the hands of State officials upon his return, and would thereby satisfy the public official requirement. Australia argued that the application was inadmissible as the alleged torturous acts were committed by non-State officials acting in their private capacity. In response, counsel for the applicant argued that in instances where a central government is absent “the likelihood that other entities will exercise quasi-governmental powers” increases. At the time, certain armed clans were in effective control of territories within Somalia. Accordingly, counsel argued, the public official requirement in Article 1 was met. The Tor-

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97 Id.
98 Id. ¶ 2.5.
100 Elmi, CAT/C/22/D/120/1998, ¶ 2.4.
101 Id.
102 Id. ¶ 2.5.
103 Id. ¶ 4.20.
104 Id. ¶ 4.20.
106 Id. ¶ 5.1.
107 Id. ¶¶ 5.2, 5.5.
ture Committee agreed with the applicant’s view. In rejecting the Australian contention, the Committee, which impliedly referred to the international law definition of state, noted:

For a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments.

In sum, acts by groups exercising quasi-governmental power represent acts committed by public officials and could constitute torture. However, this theory only applies in exceptional cases where a State has been without a functioning central government for a certain period of time, and the international community has dealt with the group or groups supposedly in power (for example, the warring clans in Somalia), thereby giving these factions quasi-governmental status.

Some critics have cast doubt on the ability of the Torture Committee to realize its mandate. Matthew Lippman, for example, claims that the independence of the Torture Committee could be eroded significantly since the ten experts are nominated, elected, and financed by State Parties. Therefore, he concludes, the Torture Committee is unlikely to take “bold or controversial initiatives.” This position is questionable. The jurisprudence that emerged from the Torture Committee challenges Lippman’s allegation. Contrary to Lippman’s assertion, the Torture Committee has made bold and controversial decisions against State Parties, such as Australia in Elmi. Indeed, the Elmi decision is a significant development in CAT jurisprudence, because it shows the Committee’s willingness to adopt a flexible and broader protection-based approach in interpreting the Convention.

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108 See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097 (entered into force Dec. 26, 1934) (underlining that one of the qualifications of a state is the “capacity to enter into relations with other states”).


111 Id.

It would be difficult, therefore, for a claimant to invoke this line of argument once a central government is re-established. Subsequent applications, such as *H.M.H.I.*, 113 *Y.H.A. v. Australia*, 114 and *United States v. Finland*, 115 addressed this point. In the 2001 decision of *H.M.H.I.*, H, a Somalia national, sought to invoke Article 3 of CAT following the rejection of his application for refugee status. Australia argued that since October 2000 an internationally recognized Transitional National Government (TNG) had been established in Somalia. 116 They argued that elections had been held at all levels 117 and that the political circumstances in Somalia had changed since the *Elmi* decision in 1998. H responded by asserting that although a TNG was operational in Somalia, its authority was limited and confined to Mogadishu, the capital city. 118 He claimed that the rest of the country was still under control of the warring factions. The Torture Committee rejected his argument. It held that State authority had been re-established in Somalia in the form of the TNG, “which has relations with the international community in its capacity as National Government, though some doubts may exist as to the reach of its territorial authority and its permanence.” 119 In the Committee’s opinion, this case fell outside the *Elmi* exception. 120

d. *Lawful Sanctions*

Lastly, the act that leads to severe pain and suffering should not arise from “lawful sanctions.” 121 Notably, CAT does not define or seek to interpret the term “lawful.” Nonetheless, the term could be taken to mean those acts that are permitted by the law. As the Australian High Court noted in the 1909 decision of *Bear v. Lynch*, 122 a lawful act is one that is not forbidden by law. 123 Failure by CAT to define the phrase “lawful sanctions” leaves Article 1 open as to whether the sanctions must be lawful under international and/or domestic standards. 124 Pnina

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117 Id.
118 Id. ¶ 5.2.
120 See infra Section 4.
121 CAT, supra note 12, art. 1.
122 (1909) 8 C.L.R. 592.
123 Id. at 600, 603, 606.
124 Id.
Sharvit, a one-time Judge Advocate General of the Israel Defence Forces, claims that only domestic standards must be satisfied.\textsuperscript{125} This position is accurate to a certain extent. Both Article 2—requiring State Parties to make the necessary domestic arrangements to implement CAT—and Article 4—urging State Parties to ensure that “all acts of torture are offenses under its criminal law”—of CAT introduce national standards.\textsuperscript{126}

Article 4, however, should not be interpreted to mean that State Parties are granted liberty to pass legislation to legitimize what could otherwise amount to torture in light of domestic and international standards.\textsuperscript{127} If this were the case, then the provision would have very little practical meaning and extremely limited application. While Article 4 only refers to domestic law, Article 1 also embraces international legal standards.\textsuperscript{128} Support is found in the intention of the treaty, as expressed in its preamble, to ameliorate torture throughout the world and buttress the already existing international human rights law.\textsuperscript{129} Arguably, the provision imports international human rights standards into the equation. In addition, Article 2(1) of CAT stipulates that Article 1 of the treaty is “without prejudice to any international instrument or national legislation which does not contain provisions of wider interpretation.”\textsuperscript{130} Moreover, the principal that human rights transcend national borders is today generally accepted.\textsuperscript{131} As such, sanctions must be consistent with both international and domestic legal standards.

Neither Article 1 nor any other article in CAT attempts to define what would amount to “cruel, inhuman or degrading punishment.” The \textit{travaux préparatoires} suggest that, owing to the vagueness of these terms, it was “impossible to find any satisfactory definition.”\textsuperscript{132} Consequently, each case is assessed on its own merits.

\textsuperscript{125} Pnina Sharvit, \textit{The Definition of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment}, 23 Isr. Y.B. Hum. Rts. 147, 169 (1994).
\textsuperscript{126} CAT, \textit{supra} note 12, arts. 2, 4.
\textsuperscript{127} See \textit{id.}, art. 4.
\textsuperscript{128} See \textit{id.}, arts. 1, 4.
\textsuperscript{129} See \textit{id.}, pmbl.
\textsuperscript{130} \textit{Id.}, art. 2.1.
\textsuperscript{131} See UDHR, \textit{supra} note 13, pmbl. (recognizing the “inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”).
\textsuperscript{132} Burgers & Danelius, \textit{supra} note 29, at 122.
B. Preventing Torture

CAT imposes two important obligations upon State Parties. The first obligation is contained in paragraph 1 of Article 2 and requires State Parties to make formal and non-formal arrangements at the domestic level to prevent torture from occurring within the State and its territories.\textsuperscript{133} It makes it mandatory for State Parties to undertake judicial and non-judicial measures that will eradicate torture. Notwithstanding its broad wording, this provision is crucial, as it not only seeks to prevent torture from occurring within the physical boundaries of a State but also in other territories under its mandate. Other territories include a State Party’s territorial waters and exclusive economic zone, its excised migration zones, “ships flying its flag, and aircraft registered in the State concerned as well as platforms and other installations on its continental shelf.”\textsuperscript{134} In addition, paragraph 3 of Article 2 prohibits a perpetrator from invoking orders from a “superior officer” or “public authority” to justify acts of torture or other cruel or degrading treatment or punishment.\textsuperscript{135} The paragraph was drafted against the background of the Nuremberg trials where junior officers raised the defense of superior orders to justify acts that could amount to torture or cruel, inhuman, or degrading punishment.\textsuperscript{136} This is an important element in making the prohibition of torture effective; it pre-empts accused torturers from successfully pleading that they were not acting on their own volition in an effort to defeat the “intentionally inflicted” requirement of the torture definition.

Reinforcing paragraphs 1 and 3 is paragraph 2 of Article 2, which bars State Parties from derogating from the treaty.\textsuperscript{137} In other words, the Convention bars State Parties from taking measures that are contrary to their obligations under the treaty. Unlike many human rights protection treaties, this prohibition is not limited to times of peace.\textsuperscript{138}

\begin{itemize}
\item Connectivity: \textsuperscript{133} CAT, \textit{supra} note 12, art. 2.
\item Connectivity: \textsuperscript{134} BURGERS & DANELIUS, \textit{supra} note 29, at 124.
\item Connectivity: \textsuperscript{135} CAT, supra note 12, art. 2.
\item Connectivity: \textsuperscript{136} Walter Rockler, who served as a prosecutor at the Nuremberg trials from 1947 to 1949, writes that “Nuremberg developed the doctrine that so-called superior orders may possibly serve as mitigation, but not as exoneration for war crimes.” See Walter Rockler, \textit{Judgments of Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors}, 16 B.C. THIRD WORLD L.J. 193, 209–12 (1996).
\item Connectivity: \textsuperscript{137} CAT, supra note 12, art. 2.
\item Connectivity: \textsuperscript{138} See, \textit{e.g.}, Organization of American States, The American Convention on Human Rights art. 27(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention] (“In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take
Rather, it is an absolute right to be free from torture, from which there is no derogation, even on grounds of national security or local politics:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.\textsuperscript{139}

In 1993, the Torture Committee reiterated the terms of paragraph 3 of Article 2 during an inquiry it conducted against Turkey pursuant to Article 20 of CAT, which empowers the committee to inquire into acts of torture that are alleged to be committed in a State Party’s territory.\textsuperscript{140} The Torture Committee pointed out that “no exceptional circumstances whatsoever . . . , may be invoked as a justification of torture.”\textsuperscript{141}

C. Refoulement

International law guarantees every person who has been forced to flee her or his home State the right to seek and enjoy asylum in another State. Article 14 of the UDHR provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”\textsuperscript{142} Child (persons under the age of eighteen) asylum seekers are also guaranteed this entitlement under the terms of the 1990 Convention on the Rights of the Child (CRC).\textsuperscript{143} Article 22 of the CRC requires States to:

\begin{quote}
measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Aug. 3, 1953) (“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”).
\end{quote}

\textsuperscript{139} CAT, supra note 12, art. 2.
\textsuperscript{141} \textit{Id.} at 428.
\textsuperscript{142} UDHR, supra note 13, art. 14.
[T]ake appropriate measures to ensure that a child who is seeking refugee status . . . , whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments . . . .\(^\text{144}\)

Even so, there is no corresponding duty on State Parties to admit asylum seekers. States view such an obligation as an encroachment on their sovereignty. During the drafting of the Refugee Convention, the Canadian delegate was clear that, even if his country adopted the Refugee Convention, “its federal structure meant that the provincial authorities were sovereign in certain fields.”\(^\text{145}\) In recent times, asylum States, such as Australia, while invoking sovereignty, have claimed that they have a right to decide whom to admit into their territory and to determine the terms under which those who are admitted are allowed to stay.\(^\text{146}\) The reluctance to erode State sovereignty explains why States that adopted the Refugee Convention failed to embrace the 1967 Declaration on Territorial Asylum,\(^\text{147}\) which sought to entrench the right to asylum in international refugee law.\(^\text{148}\)

The Refugee Convention provides for the right of *non refoulement*. Under this obligation, States are prohibited from expelling, returning (*refouler*), or extraditing a person to any territory where it is more likely than not that he or she could face torture. Articles 32 and 33 of the Refugee Convention provide for this prohibition.\(^\text{149}\) Article 32 sets constraints on the ability of States to expel a refugee in their territory lawfully:

(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

\(^{144}\) *Id.* art. 22.

\(^{145}\) *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting* U.N. Doc. A/CONF.2/SR.3 at 17 (Nov. 19, 1951) (statement of Mr. Chance, Canada) [hereinafter *Summary Record of the Third Meeting*].


\(^{148}\) *Id.* art. 1.

\(^{149}\) Refugee Convention, *supra* note 7, arts. 32, 33.
(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.\footnote{Id. art. 32.}

Article 33 provides for the norm of \textit{non refoulement}. It prohibits States from:

\textit{[E]xpel[ling] or return[ing]} (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.\footnote{Id. art 33.}

These provisions are consistent with a proposal made by the Swedish delegate at the Conference of Plenipotentiaries.\footnote{The original Swedish amendment proposal reads:}

Article 3 of CAT codifies the norm of \textit{non-refoulement}.\footnote{CAT, supra note 12, art. 3.} This Article has no equivalent in the Torture Convention, and thus creates a significant addition to the international human rights protection framework. The wording of Article 3 draws explicitly on the language of Article 33 of the Refugee Convention, which prohibits State Parties from \textit{refouling} asylum seekers to States where their lives would be threatened.\footnote{Refugee Convention, supra note 7, art. 33; CAT, supra note 12, art. 3.}

To reiterate, the appropriate test is whether it is more likely than not that a person will suffer torture if returned to a particular State. The crucial question is not whether there are substantial grounds “for believing that the applicant would be tortured if returned, but rather whether there are substantial grounds for believing that he or she

would be in danger of being tortured.”\textsuperscript{155} This position is consistent with the emerging jurisprudence from the Torture Committee.\textsuperscript{156} At its 317th meeting, the Torture Committee issued its first General Comment to guide State Parties and individuals regarding the implementation of Article 3 within the context of the procedure envisaged in Article 22.\textsuperscript{157} The General Comment interpreted the reference to “another State” in CAT’s Article 3 broadly. According to the General Comment, the phrase “another State” refers to “the State to which the individual concerned is being [transferred], as well as any State to which [he or she] may subsequently be expelled, returned or extradited.”\textsuperscript{158}

Article 3 requires that a decision on whether substantial grounds have been established be guided by, among others, an assessment of the general human rights situation of the country of return.\textsuperscript{159} Factors to be taken into consideration include the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.\textsuperscript{160} This does not mean that a person is automatically immune from being transferred to a State with a poor human rights history. Nor does it mean that he or she is obviously returnable to a State with a good human rights record. As the Torture Committee has consistently maintained, one must adduce “additional grounds” to demonstrate that he or she “would be personally at risk.”\textsuperscript{161} Each case must be examined on its own merits, with the human rights pattern of a State remaining a weighty factor. Relevant considerations, according to the General Comment, include:

- Has the person been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this in the recent past?

\textsuperscript{155} David Weissbrodt & Isabel Hörtreiter, The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of other International Human Rights Treaties, 5 Buff. Hum. RTS. L. Rev. 1, 14 (1999).


\textsuperscript{158} Id. ¶ 2.

\textsuperscript{159} See CAT, supra note 12, art. 3.

\textsuperscript{160} Id. art. 3(2).

• Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
• Has the internal situation in respect of human rights altered?
• Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
• Is there any evidence as to the credibility of the author?
• Are there any factual inconsistencies in the claim of the author? If so, are they relevant?  

Sources of information would include U.N. agencies, governments, non-governmental organizations, international and local human rights groups, domestic and international newspapers, and writings of observers.

Although the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, the Torture Committee maintains that an individual, upon whom the burden rests, does not have to show that the risk is highly probable. If this was the case, it would be “contrary to the spirit” of CAT. In fact, in certain respects, the Committee has been known to grant considerable latitude to applicants. For example, in the landmark decision of Pauline Kisoki v. Sweden, notwithstanding the contradictions and inconsistencies in the petitioner’s testimony, the Torture Committee still prohibited the State Party from returning the applicant to Zaire. The Committee argued that “complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author’s presentation of the facts are not material and do not raise doubts about the general verac-

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162 CAT General Comment, supra note 157, ¶ 8.
164 This is based on the proposition that a person who alleges the existence or non-existence of a particular set of facts must prove those facts (the burden of proof is expressed in the Latin maxim: *ei incumbit probatio que dicit, non quit negat*).
165 CAT General Comment, supra note 157, ¶ 6.
166 Burgers & Danielius, supra note 29, at 127.
ity of the author’s claims.” The danger of being subjected to torture, however, must be “foreseeable . . . real and personal.”

II. STRENGTHS: CAT AND THE REFUGEE CONVENTION COMPARED

By way of comparison to international refugee law, CAT offers at least five significant advantages to refugees and asylum seekers with regard to the scope of protection, protected persons, the refoulement prohibition, the nexus requirement, and time considerations.

A. Scope

The first notable feature of CAT concerns its scope of protection. Many States have adopted and use the classic definition of refugee found in the Refugee Convention to assess claims lodged by those seeking asylum as refugees. Under the Convention, the term “refugee” means any person who has fled her or his home State owing to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion. This definition does not explicitly include asylum seekers—persons seeking protection as refugees. However, unlike the refugee treaties, CAT is more general and targets a person who, for whatever reason, is in danger of being subjected to torture if handed over to another State. Its scope thus extends to cases that involve asylum seekers. It is apparent, therefore, that the scope of CAT is more far-reaching than the Refugee Convention.

B. Excluded Persons

A second advantage CAT has over the Refugee Convention relates to categories of persons that are excluded from protection by the Convention. International refugee law excludes specific categories of per-

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168 Id. ¶ 9.3.
171 Refugee Convention, supra note 7, art. 1(A)(2).
173 See id.
sons, regardless of whether they meet the criteria of refugee set forth in Article 1(A) of the Refugee Convention, so long as there are “serious reasons” for considering that they have engaged in criminal acts, in their State of origin or elsewhere, before entering a host State.\textsuperscript{174} Before a claim is rejected because the applicant is alleged to have committed an offence, the claim is first considered in its entirety to determine whether the application has any merits. The rule is to exclude after this determination, not before.\textsuperscript{175} A person against whom there is sufficient evidence to show that he or she has committed any of the following offenses is excluded from international protection:

- A crime against peace, a war crime, or a crime against humanity, as defined in international law;
- A serious non-political crime in their home or any transit State;
- Acts contrary to the purposes and principles of the United Nations.\textsuperscript{176}

Domestic legislation of many refugee-host States also recognizes these grounds of exclusion.\textsuperscript{177}

The Exclusion Clause has a dual purpose. Primarily, the Clause is intended to prevent fugitives who may have committed criminal offenses in their State of origin or in any other State from hiding as refugees and, thereby, defeating the course of justice. The \textit{travaux préparatoires} to the Refugee Convention supports this view. In his speech to the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Sergije Makiedo, the Yugoslav representative, argued that the draft Refugee Convention was too narrow, and thus unacceptable, because the definition of the term “refugee”:

[E]xclude[d] persons who had committed crimes as defined in Article 14 (2) of the Universal Declaration of Human Rights or in Article 6 of the Charter of the International Military Tri-

\textsuperscript{174} See Refugee Convention, \textit{supra} note 7, art. 1(A).


\textsuperscript{176} Refugee Convention, \textit{supra} note 7, art. 1(F); see also UDHR, \textit{supra} note 13, art. 14(2) (The right to asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”).

bunal. [Accordingly], notorious war criminals would continue to find protection in the territory of States Members of the United Nations.\footnote{178 \emph{Summary Record of the Third Meeting,} supra note 145, at 7.}

A handbook published by the U.N. High Commissioner for Refugees (UNHCR) to guide officials during the refugee status determination proceedings explains that the Exclusion Clause was written into the Refugee Convention to prevent post-World War II criminals from gaining protection due to a host State’s lack of territorial jurisdiction to prosecute.\footnote{179 UNHCR Handbook, supra note 175, ¶ 147.} In addition, the clause bars States from according refugee status and accompanying entitlements to certain persons, especially suspected criminals who might otherwise constitute a threat to national security.

In contrast, considering that it is silent towards the exclusion of persons generally, CAT differs significantly. As long as a person is able to satisfy the criteria of torture contained in Article 1, they can invoke the \textit{non refoulement} protection. A survey of decisions handed down by the Torture Committee affirms this position.\footnote{180 See generally, \textit{e.g.}, Mutombo, CAT/C/12/D/13/1993; U.S. v. Finland, CAT/C/30/D/197/2002.} This jurisprudence demonstrates that many claimants who seek protection under CAT have been involved in political activities in their home State.\footnote{181 See generally, \textit{e.g.}, Aemei, CAT/C/18/D/34/1995; Paez v. Sweden, Comm. No. 39/1996, U.N. Comm. Against Torture, 18th Sess., U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997); S.H. v. Norway, Comm. No. 121/1998, U.N. Comm. Against Torture, 23rd Sess., U.N. Doc. CAT/C/23/D/121/1998 (Apr. 19, 2000).} In fact, it is because of their political involvement that many seek sanctuary elsewhere, mostly in the West. In the context of refugee law, these claimants would fall within the “persecution for” category of the term “refugee” of the Refugee Convention.\footnote{182 See \textit{Refugee Convention,} supra note 7, art. 1(A).}

Under CAT, this class of persons must establish that they are more likely than not to be subjected to danger if moved to the State where an offense is claimed to have been committed. In \textit{Said Aemei v. Switzerland,} S.H. v. Norway,\footnote{183 See generally \textit{Aemei}, CAT/C/18/D/34/1995.} and Gorki Paez v. Sweden, the applicants admitted that they had been involved in political and criminal activities in their home States. S, for instance, a member of the Ethiopian All-Amhara People’s Organization, was in charge of propaganda and re-
cruitment, smuggling weapons, and organizing attacks to capture weapons and making arrangements for their distribution. Aimei, an activist for the Iranian People’s Mojahedin, confessed to throwing a Molotov cocktail into the house of a senior Iranian official.

In Paez, the Swiss Board of Immigration rejected the claimant’s application for asylum because he had participated in serious non-political crimes in Peru, contrary to article 1F of the Refugee Convention and Chapter 3(2) of the 1990 Aliens Act. This decision, which the Appeals Board affirmed, was based on Paez’s admission that he distributed leaflets and handmade bombs that were used against the police during a demonstration in Peru. In finding for the applicant, the Torture Committee underlined the absolute nature of CAT:

The Committee considers that the test of article 3 of [CAT] is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 . . . .

Does this mean that “bad” refugees—those likely to be excluded from refugee protection on grounds of national security—can circumvent the criminal justice system by hiding under CAT? Considering that the primary goal of CAT is to combat torture, all potential victims are protected for as long as they are in danger of being subjected to torture, irrespective of a person’s past conduct. As noted by the Swiss delegate at the drafting process, the “aim of the [Convention] was not to create new categories of victims.” Even so, once it is established that a person is no longer at risk, he or she can be transferred to any State where it is alleged that an offense was committed for prosecution.

It must also be emphasised that a finding in favor of a failed asylum applicant under Article 3 of CAT in no way guarantees a person refugee

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188 Paez, CAT/C/18/D/39/1996, ¶ 2.3.
189 Id.
190 Id. ¶ 14.5.
191 Burgers & Danelius, supra note 29, at 49.
status or affects an asylum application. The question of whether or not a person should be granted asylum rests on a refugee-receiving State.

C. Refoulement

The third advantage relates to the norm of *refoulement*, which all treaties prohibit. In the context of refugee law, Article 33 of the Refugee Convention prohibits State Parties from expelling or returning refugees to States where they are likely to face the risks they originally fled.\(^{192}\) Although the Refugee Convention further prohibits States from making reservations on, among others, Article 33,\(^{193}\) the general protection offered to refugees is nonetheless limited considering that States can derogate from this provision on grounds of national security. Article 32 of the Refugee Convention, which prohibits States from *refouling* refugees save for reasons of “national security or public order,” reinforces this provision.\(^{194}\)

In contrast, CAT prohibits States from derogating from Article 3 if a person satisfies the criteria set forth in Article 1.\(^{195}\) Article 3 of the 1975 Torture Convention first established this rule:

> Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.\(^{196}\)

This prohibition is currently found in Article 2 of CAT, which provides:

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.\(^{197}\)

Unlike refugee law, the *non-refoulement* provision in CAT is absolute and non-derogable, even for reasons of public emergency, and irrespective of a claimant’s criminal record. Therefore, under no exceptional cir-

\(^{192}\) Article 33 prohibits States from “expel[ling] or return[ing]” (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 7, art. 33.

\(^{193}\) Article 42(1) of the Refugee Convention provides that “at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to” Article 33. *Id.* art 33.

\(^{194}\) Refugee Convention, *supra* note 7, art. 32.

\(^{195}\) CAT, *supra* note 12, arts. 1, 3.

\(^{196}\) G.A. Res. 3452 (XXX), *supra* note 19, art. 3.

\(^{197}\) CAT, *supra* note 12, art. 2 (emphasis added).
cumstances whatsoever is a State justified in returning a potential victim of torture to any State. The Torture Committee has consistently emphasised this position. In Aemei, for instance, it was underlined that:

[T]he protection accorded by article 3 of the Convention is absolute. Whenever there are substantial grounds for believing that a particular person would be in danger of being subjected to torture if he was expelled to another State, the State party is required not to return that person to that State. The nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the [CAT].

Similarly, in Paez the Torture Committee contended:

[T]he test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the [CAT].

Because Article 2 of CAT covers any State, not merely an applicant’s home State, State Parties to the treaty, or transit States, this gives CAT “potentially wide territorial scope.” The legislative history of CAT suggests that the provision was written into the treaty in order to make the refoulement provision “more complete.” Worthy of note is that the grounds enumerated in Article 3 are examples of circumstances that might otherwise give rise to “public emergency.” Thus, other circumstances may be brought under this heading as long as an applicant can demonstrate that they fall within the general category of public emergency. The Torture Committee made this point in Balabou Mutombo v. Switzerland and Khan v. Canada, where it sought to prohibit Switzerland and Canada from returning failed asylum claimants.

200 Anker, supra note 45, at 521–22.
201 Burgers & Danelius, supra note 29, at 126.
202 CAT, supra note 12, art. 3.
who had nonetheless demonstrated that they could suffer torture if repatriated.

In *Mutombo*, the applicant, a Zaire (now Democratic Republic of Congo (DRC)) national, alleged that he had suffered torture at the hands of Government officials because of his membership in a pro-democracy political party, Union pour la Démocratie et le Progrès Social (UDPS). The applicant claimed that the UDPS had challenged the despotic rule of the late President Mobutu Sese Seko. The applicant alleged that he was subjected to electric shocks, beaten with a rifle, and that his testicles were bruised until he lost consciousness. He then fled to Switzerland and applied for asylum. His primary application to the Cantonal Office for Asylum Seekers was rejected on grounds of credibility. Subsequent appeals to the Federal Refugee Office and Commission of Appeal in Refugee Matters also failed, and he became at risk of deportation.

The applicant’s main assertion before the Torture Committee was that there was a real risk that he would suffer torture if returned to the DRC. Responding to this allegation, Switzerland argued that the applicant had failed to satisfy the “substantial grounds for” test in Article 3(1) of the Swiss Aliens Act. Considering the generalized violations of human rights that had been reported in Zaire, Switzerland argued that to come under Article 3 the applicant had to show that he belonged to a particular group, that was confined to a particular territory, at whom the violations were directed. In short, the applicant had to show that a real risk existed that he could be subjected to torture. The Torture Committee found that there were substantial grounds for believing that the applicant would be in danger of being subjected to torture if returned to the DRC. It drew on his political record and the serious human rights situation in Zaire, which various U.N. agencies had documented. These agencies included the Commission on Human Rights and special reports prepared by, among others, the Special Rapporteur on the Question of Torture. In conclusion, the Committee

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205 *Mutombo*, CAT/C/12/D/13/1993, ¶¶ 2.1, 2.2.
206 *Id.*
207 *Id.* ¶ 2.2.
208 *Id.* ¶ 2.3.
209 *Id.* ¶¶ 2.4–2.5.
211 *Id.* ¶ 6.1.
212 *Id.* ¶¶ 6.2–.5.
213 *Id.* ¶ 9.6.
214 *Id.* ¶ 9.5.
noted “that a consistent pattern of gross, flagrant, or mass violations does exist in Zaire and that the situation may be deteriorating.”

Accordingly, the Torture Committee held that returning the applicant to the DRC would constitute a violation of CAT Article 3. It also declared that Switzerland had an “obligation to refrain from expelling [the applicant] to Zaire, or any other country, where he runs a risk of being expelled or returned to Zaire or of being subjected to torture.” An asylum seeker can only be returned when he or she is no longer in danger of being subjected to torture. In this respect, the scope of Article 33 of the Refugee Convention is much narrower than Article 3 of CAT.

D. Nexus Requirement

For an individual to be granted refugee status under the Refugee Convention, the alleged victim must demonstrate that he or she suffered persecution for “reasons of” any one of the five grounds enumerated in the treaty. In *Y.H.A. v. Australia,* for example, the petitioner’s asylum claim was rejected because he was unable to prove a nexus between the danger that he faced and his clan membership. Relief under CAT is not limited by a nexus requirement. A person only needs to establish the substantial likelihood of enduring severe mental pain or suffering inflicted by a public official if returned to another State. Cases like *Paez,* *Aemei,* and *Mutombo* support this proposition. This is a significant development because failure to connect persecution with any one of the five specified reasons has led, and continues to lead, to the rejection of otherwise meritorious asylum applications in various parts of the world.

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216 *Id.* ¶ 10.
217 *See* Refugee Convention, *supra* note 7, art. 33; CAT, *supra* note 12, art. 3.
218 *See* Refugee Convention, *supra* note 7, art. 1(A)(2).
220 *Id.* ¶¶ 2.6–.8.
221 *See* *Paez,* CAT/C/18/D/39/1996, ¶ 5.2.
222 *See* *Aemei,* CAT/C/18/D/34/1995, ¶ 9.5.
223 *See* *Mutombo,* CAT/C/12/D/13/1993, ¶ 9.3.
E. Assessment of Applications: Time Concerns

Refugee status applications and applications for relief under CAT are first heard and determined by a status assessment official or the Torture Committee, respectively.\textsuperscript{225} Generally, the adjudicating bodies apply the requisite legal tests to the evidence to determine whether a person meets the set criteria. Successful applicants are granted protection under both regimes.\textsuperscript{226} A major difference, however, exists with regard to failed claimants. Those asylum seekers whose claims are rejected under the refugee framework can challenge these decisions through an appeals process,\textsuperscript{227} which is available in most refugee-host States.\textsuperscript{228} In contrast, those whose claims are rejected by the Torture Committee have no further recourse.\textsuperscript{229} This Section focuses on the time spent to finalize asylum and torture applications. Figures 1 and 2 (below) are graphical representations of the procedures used to assess refugee and torture applications.

Applications lodged under the refugee framework involve more procedural steps than those filed under CAT.\textsuperscript{230} Consequently, it may take longer to obtain relief via the refugee route, especially in instances where a claim is rejected and an asylum seeker lodges an appeal. In many instances, the multi-layered asylum process has lengthened the road to relief for refugee applicants, as compared with that of those who seek protection under CAT. Table 1 below\textsuperscript{231} compares and contrasts the (approximate) time it took to assess refugee and torture applications for a period of just over ten years, from 1993 to 2004. The data is drawn from claims lodged by failed asylum seekers who subsequently sought relief from the Torture Committee. For consistency purposes, the same claims are used and fourteen applications are analyzed.

\textsuperscript{225} See infra figures 1 and 2.
\textsuperscript{226} Id.
\textsuperscript{227} See infra figure 2.
\textsuperscript{229} See infra figure 1.
\textsuperscript{230} See infra figures 1 and 2.
\textsuperscript{231} Data from fourteen applications outlined in table 1.
Table 1: Time Required to Assess Applications

<table>
<thead>
<tr>
<th></th>
<th>Refugee Claims</th>
<th>Torture Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1 years</td>
<td>1 (Elmi)</td>
<td>3 (GRB, Elmi, SA)</td>
</tr>
<tr>
<td>1–2 years</td>
<td>5 (SG, YHA, Villamar, RT, SA)</td>
<td>6 (Paez, HMHI, US, YHA, SH, RS)</td>
</tr>
<tr>
<td>2–3 years</td>
<td>4 (GRB, SH, HMHI, US)</td>
<td>2 (RT, BSS)</td>
</tr>
<tr>
<td>3–4 years</td>
<td>1 (RS)</td>
<td>1 (Villamar)</td>
</tr>
<tr>
<td>4–5 years</td>
<td>2 (SV, Paez)</td>
<td>2 (SV, SG)</td>
</tr>
<tr>
<td>Above 5 years</td>
<td>1 (BSS)</td>
<td>0</td>
</tr>
</tbody>
</table>

What does the data suggest? Of the fourteen applications that came before the Torture Committee between 1993 and 2004, just under one-fifth (three applications, or twenty-one percent) were decided within one year. A much lower output of seven percent (one application) was recorded for refugee claims. According to the survey, the vast majority of asylum applications (twelve applications, or eighty-six percent) were handed down in between one and five years. Again, the Torture Committee posts a favorable outcome, as just over two-thirds (eleven applications, or seventy-eight percent) of the surveyed claims were assessed within these time lines. Lastly, whereas at least one asylum claim took over five years to finalize, none of the applications lodged in the Torture Committee fell into this category. This evidence suggests that the probability of receiving a decision, positive or negative, within one year under the CAT framework is almost three times higher than under the refugee regime. Additionally, the chances that a claim will be heard and determined within five years are lower under the refugee assessment framework. Moreover, it is highly unlikely for an application lodged with the Torture Committee to take more than five years to finalize. In sum, the data supports the argument that applications under the CAT regime are generally expedited, notwithstanding the fact that the Torture Committee meets only twice every year.  

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232 See U.N. High Comm’r for Hum. Rts., Committee Against Torture: Monitoring the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at http://www.ohchr.org/english/bodies/cat/ (last visited Apr. 21, 2007) (“The [Torture] Committee meets in Geneva and normally holds two sessions per year consisting of a plenary (of three weeks in May and two weeks in November) and a one-week pre-sessional working group.”).
III. LIMITATIONS: TORTURE CONVENTION AND INTERNATIONAL REFUGEE LAW

Within the CAT communication system, at least four shortcomings can be identified. These relate to the evidentiary threshold, the perpetrator of the act causing flight, the claim application process, and enforcement mechanisms.

A. Evidentiary Threshold

The evidentiary threshold or standard of proof that a petitioner should satisfy presents the first shortcoming associated with proceeding under CAT. To succeed under this treaty “substantial grounds” must be established. The original Swedish draft of the Torture Convention proposed that there should be reasonable grounds to believe that a person might be in danger of suffering torture and other cruel, inhuman, degrading inhuman, or degrading treatment or punishment. Under the terms of the present wording, there must be a “factual basis for [a person’s] position sufficient to require a response from the State party.” This could involve considering matters such as the human rights record of the State to which a person is to be transferred. The Torture Committee has consistently maintained that the mere possibility of a person being subjected to torture in their home State does not suffice to prohibit his or her return owing to incompatibility with the non-refoulement provisions of CAT. The Committee has also contended that the existence of a State’s consistent pattern of gross, flagrant, or mass violations of human rights does not constitute sufficient grounds for determining that a person would be in danger of being subjected to torture upon return to that State; additional grounds must exist that indicate that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific

233 CAT, supra note 12, art. 3 (emphasis added).
235 Id. art. 4 (emphasis added).
236 CAT General Comment, supra note 157, ¶ 5.
circumstances. Therefore, it is crucial for a person to adduce additional evidence that will sufficiently demonstrate that the risk he or she claims to face is real, personal, and foreseeable.

In *Mutombo*, for example, the claimant’s profile was a key consideration in the assessment of his application. Factors that were noted included his ethnic background, alleged political affiliation, detention history, desertion from the army, and clandestine departure from the DRC. Also considered were the gross human rights violations in which his home State was allegedly involved. Reports from U.N. agencies like the Commission of Human Rights, the Special Rapporteur on the Question of Torture, and the Working Group on Enforced or Involuntary Disappearances were referred to in an effort to determine the prevailing human rights situation in the country. These sources illustrated a “consistent pattern of gross, flagrant or mass violations” of human rights that was unlikely to improve in the near future. After considering the evidence, including the fact that the DRC was not a party to CAT, the Torture Committee concluded that it was more likely than not that the applicant would suffer torture if returned to his home State.

In *Y.H.A* and *H.M.H.I*, the Torture Committee rejected claims by Somali nationals because State authority had been re-established in Somalia in the form of the TNG. These decisions raise serious concerns. The first concern lies in the Committee’s acknowledgement that there were still widespread violations of human rights in the country. In *Y.H.A.*, the Torture Committee recognized the “ongoing widespread violations of human rights in Somalia.” In *H.M.H.I.*, the Committee noted “the existence in the [country] of a consistent pattern of gross, flagrant or mass violations of human rights.” Granted, the Torture Committee has persistently maintained that the existence of human rights violations is *per se* insufficient to prove a claim. This brings us to the second concern, which relates to the doubts that the Torture Committee itself raised in *H.M.H.I* regarding the reach of the TNG’s

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241 Id.
242 Id. ¶¶ 9.3, 9.5.
243 Id. ¶ 9.5.
246 See *infra* notes 226–29 and accompanying text.
territorial authority and its permanence. Considering the seemingly changed political circumstances, it is possible to distinguish Y.H.A and H.M.H.I from Elmi. Even so, it is still doubtful whether the applicants would have received effective protection if they were returned to their home State. It was averred in H.M.H.I that the applicant ought to have adduced “additional grounds” to show that he was “personally at risk.” However, the nature or content of the additional evidence required to prove a claim in such instances remains unclear. In fact, the Committee has so far failed to shed any light on this issue. Indeed, the practice of giving sufficient reasons for a decision promotes one of the fundamental requirements of due process, namely, the right to be heard (expressed in the maxim *audi alteram partem*). This approach is likely to benefit claimants and States alike, as well as the general human rights and refugee regimes.

As is the case with applications seeking relief under CAT, the burden of proof lies with the asylum seeker to demonstrate that he or she meets the definition of a refugee. In contrast to the CAT relief regime, the threshold test of the Refugee Convention is ostensibly lower, and only requires proof on a balance of probability. According to the UNHCR, claimants only need to establish their claims to a “reasonable degree.”

**B. Perpetrator of Act Causing Flight**

States are generally liable for acts of public administrators. In contrast, their duty in relation to acts committed by non-State officials is limited. States can only be held accountable when they fail to “exercise due diligence to prevent . . . injurious acts” committed by private actors. This brings us to the second limitation. Article 3 of CAT restricts application of the treaty to situations where a person is likely to face torture occasioned by public officials or any other person acting in the same capacity. This restriction is buttressed by Article 16 of

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249 *Id.* ¶ 6.5.

250 ICCPR, *supra* note 22, art. 14; UDHR, *supra* note 13, art. 10.

251 *UNHCR Handbook, supra* note 175, ¶ 196 (providing that the burden of proof “lies on the person submitting a claim”); *see also* Aliens Act, No. 301 § 97(4) (2004) (Fin.) (entitled “Asylum Investigation,” which requires a person applying for refugee status to “give the grounds on which he or she believes that the State in question is not safe for him or her”); Immigration Act 1987, 1987 S.N.Z. No. 74, § 129G(5) (“it is the responsibility of the claimant to establish the claim”).

252 *UNHCR Handbook, supra* note 175, ¶ 42.

253 *Jennings & Watts, supra* note 74, at 549.

254 CAT, *supra* note 12, art. 3.
CAT, which requires States to “undertake measures to prevent” torture by public officials “or any other person acting in a personal capacity.” Consequently, a person can be handed over to a State where there are high chances that they could face severe physical or mental suffering caused by private individuals or groups, unless it can be shown that the State was unwilling to control them.

There are several instances where the Torture Committee has rejected applications lodged by failed asylum applicants because private actors committed the alleged acts. Examples include S.V., Luis Chorlango v. Sweden, and G.R.B. Chorlango, an Ecuadorian national, and S, a Tamil from the area of Jaffna in north Sri Lanka, sought asylum in Sweden and Canada respectively. Both alleged that they were at risk of torture at the hands of guerrilla groups, namely, Fuerzas Armadas Revolucionarias del Ecuador-Defensores del Pueblo (FARE-DP) (Chorlango) and LTTE (S.V.). S further claimed that his refusal to join LTTE made him a target of the movement. Similarly, in G.R.B., G, a Peruvian national whose application for asylum was rejected by the Swedish authorities, claimed that members of Sendero Luminoso had raped and imprisoned her for several nights before she managed to escape. Both G and Chorlango claimed that they had lodged complaints with the local police, but that no action was taken. Sweden, the State Party involved in GRB and Chorlango, disputed these allegations. In Chorlango, it argued that “Ecuadorian authorities do not tolerate the activities of FARE-DP and that such activities were viewed as “criminal.” Stockholm also asserted that the claimant had failed to prove that Ecuadorian authorities were unable to protect him against FARE-DP. Canada espoused a similar line of argument in S.V. It was contended that Colombo, the capital of Sri Lanka, had taken “different measures...to investigate and prevent acts of torture.” For example, “all arrests and detentions [had to] be reported to the Human Rights Commission (es-
tablished in 1997) within 48 hours, . . . and a 24-hour service to deal with public complaints of instances of harassment by elements in the security forces had been established by the [Sri Lankan] Government.”

The Torture Committee found in favor of the State Parties in all three instances. It noted that the national authorities did not condone or tolerate activities by terrorist or guerrilla groups. Hence, acts by these non-governmental entities fell “outside the scope of article 3” of CAT, unless such entities, as was the case in Elmi, exercised non-governmental authority over the territory to which the complainant would be returned. This narrow construction, according to some scholars, is the “most significant limitation” of CAT, especially considering the myriad acts of torture that non-State entities, like insurgent groups, commit. Accordingly, this restriction renders the scope of CAT narrower than refugee law, which recognizes that persecution can emanate from both the State and non-State entities. Paragraph 65 of the UNHCR Handbook, entitled “agents of persecution,” provides:

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. . . . Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

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266 Id.
267 See, e.g., Chorlango, CAT/C/33/D/218/2002, ¶ 5.2 (where it was noted that the applicant had “not disputed the State’s party allegation that the Ecuadorian authorities do not tolerate FARE-DP activities carried out in border areas of the country, which they regard as criminal and link to a series of kidnapping and murder cases”).
271 UNHCR Handbook, supra note 175, ¶ 65.
272 See also R v. Secretary of State for the Home Department, Ex parte Adan, R v. Secretary of State for the Home Department, Ex parte Aitseguer (2001) 2 A.C. 477 (where the House of Lords found that returning asylum seekers to France and Germany, where they had stayed on the way to the United Kingdom, would constitute refoulement because those States did not recognize persecution from non-State authorities).
C. Application Process

Thirdly, although the system of individual petitions is designed to operate as an instrument of enforcement by which victims of torture can seek international protection against their defaulting Governments, the Torture Committee is empowered to entertain petitions only when a State recognizes its jurisdiction. Drawing on the language of earlier international human rights treaties, especially the 1976 ICCPR, Article 22(1) of CAT states:

A State Party . . . may at any time declare . . . that it recognizes the competence of the [Torture] Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the [Convention]. No communication shall be received by the Committee if it concerns a State Party to the [Convention] which has not made such a declaration.

As of January 1, 2006, fifty-four States had accepted the competence of the Torture Committee under Article 22 of CAT. Thus, individual petitions can only be received and heard by the Torture Committee against these States. Conversely, the Torture Committee can neither receive nor hear individual petitions against the remaining 138 States (seventy-two percent) that have not recognized its mandate.

This optional procedure allows State Parties to withdraw a declaration “at any time” without prejudicing matters that are already in the adjudication process. John Kidd writes that the weakness of CAT in

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273 According to Article 41(1) of the ICCPR:

A State Party . . . may at any time declare . . . that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the [ICCPR]. Communications . . . may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the [Human Rights] Committee. No communication shall be received by the [Human Rights] Committee if it concerns a State Party which has not made such a declaration.

ICCPR, supra note 22 art. 41(1).

274 CAT, supra note 12, art. 22(1).


276 CAT, supra note 12, art. 21, ¶ 2.

277 Id. art. 22, ¶ 8.
this regard is “hardly surprising.”\textsuperscript{278} He contends that the weak enforcement provisions are “a reflection of jealously guarded national sovereignty and a consequent reluctance, at a general international level, to permit international legal intervention in matters considered to be within a State’s domestic jurisdiction.”\textsuperscript{279}

This creates yet another fundamental weakness in CAT because States can ignore the mandate of the Torture Committee, the focal point of the CAT operational mandate. For example, following the decision in \textit{Elmi}, the Australian Federal Government in its 2000 report to the Torture Committee expressed concern “about increasing resort” to CAT by unsuccessful asylum-seekers, “apparently in an effort to delay their removal” from the country.\textsuperscript{280} Further, it argued that “in nearly all cases such people have had their claims under the Refugee Convention, [CAT] and [ICCPR] exhaustively considered by domestic processes, and had utilized multiple layers of review.”\textsuperscript{281} It concluded that in the future, “it will closely examine each request from interim measure rather than automatically complying” with them.\textsuperscript{282} In many ways Australia’s reaction to \textit{Elmi} affirms Lippman’s thesis that “a stark contradiction . . . continues to exist between the recognition that freedom from torture is a fundamental human right and the international community’s deference to state sovereignty.”\textsuperscript{283} While comparing fundamental rights such as the right to life or prohibition against slavery, Sharvit describes the prohibition against torture as one of the “most fundamental rights.”\textsuperscript{284} The fundamental point that Australia missed in \textit{Elmi} is that the protection against torture is a fundamental human right that all democratic States should combat, not encourage.

Peder Magee describes this limitation as a “severe blow to [CAT] ability to function.”\textsuperscript{285} Arriving at the decision to withdraw a declaration could be influenced by several factors, including how a State interprets any decision of the Torture Committee. This is crucial, especially considering that a vast majority of its verdicts have centered on prohibiting

\textsuperscript{279} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id. ¶ 17.
\textsuperscript{283} Lippman, \textit{supra} note 110, at 325.
\textsuperscript{284} Sharvit, \textit{supra} note 125, at 147.
States from *refouling* asylum seekers facing deportation owing to failed refugee claims. Moreover, provisions such as Article 22 would be an incentive to those State Parties that have poor human rights records to invoke and thereby remove themselves from CAT international scrutiny.286 Alternatively, some States may hesitate to become party to CAT or specific provisions, such as Article 22, thereby circumventing the intended effect of the treaty.

In addition to the requirement that petitions can only be entertained against those States that have agreed to be subject to the jurisdiction of the Torture Committee, individual claimants are required under the terms of the well-known international rule to exhaust all available domestic remedies before an application can be declared admissible.287 Notably, availability connotes accessibility. Thus, in practice, claimants must proceed to the highest or last decision maker in the hierarchy of courts and tribunals from which they would have obtained an effective remedy. As Figure 2 shows, multiple procedures guide the refugee review process.

Generally, a refugee status determination official first hears asylum applications and decides whether the claimant is a person who meets the definition of refugee in the Refugee Convention.288 An asylum seeker must demonstrate that he or she fled their home State owing to a well-founded fear of persecution in their home State based on “race, religion, nationality, membership of a particular social group or political opinion.”289 It is reasonable to assume that in objective legal systems decisions will be based on the facts that are presented and arguments that the parties advance. If it is established that an individual faces persecution for one of the Refugee Convention reasons, the next line of inquiry involves determining if he or she is a genuine asylum seeker or a “bad” refugee that ought to be excluded. Those applicants who meet the refugee definition, and are able to show that there is no reason to exclude them from protection, are granted refugee status.290 On the other hand, those claims that fail to meet these criteria are rejected.291

286 See CAT, supra note 12, art. 22.
287 Id. art. 22(5)(2) (providing that “[t]he [Torture] Committee shall not consider any communication from an individual under this article unless it has ascertained that: 2. The individual has exhausted all available domestic remedies.”)
288 See infra figure 2.
289 This is pursuant to Article 1(A)(2) of the Refugee Convention.
290 See infra figure 2.
291 See id.
Rejected applicants can appeal their cases to the requisite appellate court or tribunal. The first appellate decision-maker can either affirm or set aside the primary decision. If the latter option is exercised, the matter is returned to the official who heard the initial application for reconsideration in accordance with the terms outlined by the appellate court or tribunal. Dissatisfied parties can lodge further appeals (usually before courts). Like the first appellate body, its second counterpart may affirm or set aside the primary decision. Rejected asylum seekers at this stage become liable to deportation. Their successful counterparts are returned to the original decision maker. Although a court is the final arbiter in the judicial hierarchy, rejected claimants in some States have a last chance to plead their case after exhausting the judicial machinery. For example, in Australia and Canada, failed refugee claimants can appeal their cases to the Immigration Minister on compassionate and humanitarian grounds. In situations where discretionary remedies for failed applicants exist, these, too, must be invoked because they are also an effective form of domestic relief.

The exhaustion of all available domestic remedies rule reiterates provisions of international human rights law. For example, like CAT, the ICCPR states:

The [Human Rights] Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the mat-

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292 See id.
293 See id.
294 See id.
295 See infra figure 2.
296 See id.
297 See id.
298 See id.
299 See id.

298 Section 417 of the Migration Act 1958 empowers the Immigration Minister on grounds of “public interest” to “substitute for a decision” of the Refugee Review Tribunal “another decision, being a decision that is more favourable to the applicant.” Migration Act, 1958, § 417 (Austl.). Also, section 501J states that “[i]f the Minister thinks that it is in the public interest to do so, the Minister may set aside an [Administrative Appeals Tribunal] protection visa decision and substitute another decision that is more favourable to the applicant in the review.” Id.

299 Section 25(1) of the 2001 Immigration and Refugee Protection Act allows the Canadian Immigration Minister, on application or on his or her own volition, to grant an asylum seeker “permanent resident status or an exemption from any applicable criteria or obligation of [the] Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.” Immigration and Refugee Protection Act, S.C. 2001, ch. 27, § 25(1) (2001).
ter, in conformity with the generally recognized principles of international law.\textsuperscript{300}

Similarly, Article 11(3) of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICEFRD)\textsuperscript{301} is clear that applications will be entertained once “all available domestic remedies have been invoked and exhausted.”\textsuperscript{302} The remedies to be exhausted are those established by municipal law.

In terms of scope, the remedies to be exhausted under CAT are those established by municipal law as well. Two exceptions to the rule exist. First, in instances where the application for domestic remedies is unreasonably lengthy, Article 22(5)(2) of CAT creates an exception.\textsuperscript{303} Like the ICCPR and the ICEFRD, it states that the rule of local remedies, as it is sometimes referred to as, is inapplicable “where the application of the remedies is unreasonably prolonged.”\textsuperscript{304} Thus, the rule of local remedies is inapplicable to situations where a person is unable to receive quick and efficient adjudication. Claimants bear the burden of showing that they are unable to receive quick and efficient adjudication. This exception recognizes the natural law maxim that justice delayed is justice denied. The test seems to be one of time, rather than one of access to “procedural facilities.”\textsuperscript{305} In light of the universal and unique nature of claims that come before the Torture Committee, few would deny that it is unattainable to lay a common standard regarding undue delay in the administration of justice. Hence, again, each case will have to be determined on its own merits.

The exhaustion of local remedies also requires a person to have recourse to the available substantive remedies for the object sought. Accordingly, and in contrast to ICEFRD and ICCPR, the local remedies rule under CAT is inapplicable in situations where it seems unlikely that invoking the domestic legal framework will bring any effective relief to a claimant.\textsuperscript{306} In Bouabdallah Ltaief\textsuperscript{307} v. Tunisia, the Torture

\begin{thebibliography}{99}
\item \textsuperscript{300} ICCPR, \textit{supra} note 22, art. 41(1)(c).
\item \textsuperscript{302} Id. art. 11(3).
\item \textsuperscript{303} CAT, \textit{supra} note 2, art. 22(5)(2).
\item \textsuperscript{304} Article 41(c) of the ICCPR and 11(3) of the ICEFRD provide that this rule does not apply where the procedure for invoking the remedies is “unreasonably prolonged.” ICCPR, \textit{supra} note 22, art 41(c); ICEFRD, \textit{supra} note 301, 11(3).
\item \textsuperscript{305} JENNINGS \& WATTS, \textit{supra} note 74, at 549.
\item \textsuperscript{306} CAT, \textit{supra} note 12, art. 22(5)(b).
\item \textsuperscript{307} Ltaief, CAT/C/31/D/189/2001, ¶ 7.2.
\end{thebibliography}
Committee admitted Ltaief’s application, even though he had not exhausted all local remedies, because it was apparent that domestic remedies were unavailable or an obviously futile means of recourse. Citing the Tunisian Statute of Limitations, the Torture Committee primarily considered that the alleged acts of torture or cruel, inhuman, or degrading treatment were barred by statute. Further, and more importantly, it was noted that, although the claimant had long before lodged complaints with the local authorities, there was hardly any evidence to suggest that the State had taken any “voluntary” investigations in relation to the allegations contained in the complaint. 308 Accordingly, the Torture Committee concluded that it was “very unlikely” in these circumstances that Ltaief “would obtain” any relief by exhausting local remedies. 309

In contrast, the Refugee Convention does not contain similar provisions, and the chances of facing problems of this nature are altogether removed. Moreover, it is now generally accepted that the norm of refoulement has attained the status of customary international law—310—that is, law that has evolved from the practice and customs of States. 311 Thus, all States, irrespective of whether they are party to the international refugee treaty, are required to refrain from returning persons to places where their lives are at risk.

D. Enforcement Mechanisms

The last limitation relates to CAT enforcement mechanism, which is greatly limited and restrictive in comparison to the Refugee Convention. Aside from the temporary protection that could be offered to refugees and asylum seekers via its non-refoulement provisions, there is little that the Torture Committee can do upon finding torture since it is a monitoring body with declaratory powers only. In Aemei, the Torture Committee made clear that “finding of a violation under article 3 has

308 Id.
309 Id.
declaratory character.”\textsuperscript{312} Thus, States are not “required to modify [their] decision(s) concerning the granting of asylum.”\textsuperscript{313}

Additionally, where a person fails to demonstrate that he or she is likely to suffer torture if repatriated to his or her home State, the Torture Committee only goes as far as stating that the applicant has failed to prove “torture” and that their removal will not constitute a breach of Articles 3 or 16. It leaves the next line of action to the State involved without making further recommendations for removal.

This gap in the law has created room for some refugee-receiving States to make a wide range of proposals regarding return of failed asylum claimants. In \textit{H.M.H.I.}, for example, Australia made a curious recommendation. They offered to return the applicant, a failed asylum seeker from Somalia, to Kenya from where he was expected to find his way “to a stable area” of his “choice” in Somalia using the UNHCR voluntarily repatriation program.\textsuperscript{314} It is unclear from the evidence whether the Australian Government had sought and, indeed, received permission from Nairobi allowing the applicant entry into Kenya. Aside from noting the undesirability of removing the applicant to another State and expecting him to repatriate to his home State, there is very little that the Torture Committee can do to ensure that a failed applicant is actually returned to a safe place in the relevant home State.

On the other hand, unlike the protection provided by CAT, international refugee law offers permanent or durable solutions, such as resettlement in third States and local integration, in addition to the non-refoulement prohibition. Figures 1 and 2 below are representations of enforcement mechanisms under CAT and the Refugee Convention respectively.

\begin{itemize}
\item \textsuperscript{312} \textit{Aemei}, CAT/C/18/D/34/1995, ¶ 11.
\item \textsuperscript{313} \textit{Id}.
\item \textsuperscript{314} \textit{H.M.H.I.}, CAT/C/28/D/177/2001, ¶ 4.11.
\end{itemize}
Enforcement Mechanisms Under the CAT

Asylum Seeker

Torture Committee

Application Allowed

Application Rejected

Non-refoulement Declaration Issued

Applicant becomes liable for Repatriation

Figure 1
Figure 2
E. CAT and Refugee Convention Compared and Contrasted

Table 2 below compares and contrasts the nature of protection under CAT and the Refugee Convention.

<table>
<thead>
<tr>
<th></th>
<th>CAT</th>
<th>Refugee Treaty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope of protection</strong></td>
<td>Targets persons generally (includes refugees and asylum seekers).</td>
<td>Persons must be formally determined to be “refugee.”</td>
</tr>
<tr>
<td><strong>Excluded persons</strong></td>
<td>None.</td>
<td>“Bad” refugees.</td>
</tr>
<tr>
<td><strong>Refoulement provision</strong></td>
<td>Absolute, non-derogable.</td>
<td>Derogable on grounds of national security.</td>
</tr>
<tr>
<td><strong>Relief</strong></td>
<td>No nexus requirement.</td>
<td>Nexus— “for reasons of” —requirement.</td>
</tr>
<tr>
<td><strong>Time to assess claims</strong></td>
<td>Generally shorter.</td>
<td>Longer.</td>
</tr>
<tr>
<td><strong>Evidentiary threshold</strong></td>
<td>“Substantial” grounds.</td>
<td>Balance of probability.</td>
</tr>
<tr>
<td><strong>Perpetrator</strong></td>
<td>State actors.</td>
<td>State and non-State actors.</td>
</tr>
<tr>
<td><strong>Application process</strong></td>
<td>State must recognise competence of Torture Committee before individual petitions are filed.</td>
<td>Claims directly lodged with third States.</td>
</tr>
<tr>
<td><strong>Enforcement Mechanisms</strong></td>
<td>Limited to opinions.</td>
<td>Durable solutions.</td>
</tr>
</tbody>
</table>

CONCLUSION: LOOKING TO THE FUTURE

The preceding analysis demonstrates that the protection regime of CAT is wider than that of the Refugee Convention regarding issues relating to scope of protection, excluded persons, relief, and the refoulement provision, as well the time taken to consider applications. The international torture regime, however, is narrower than its asylum counterpart in relation to the evidentiary threshold, questions surrounding perpetrators of acts alleged to constitute torture, the application process, and enforcement mechanisms. Drawing on the advantages of CAT over the Refugee Convention, it is arguable that in many respects, CAT provides complementary protection to asylum seekers displaced by torture.

This is not to infer that CAT should replace the Refugee Convention. Rather, in order to protect effectively victims of torture who have been forced to seek sanctuary elsewhere, the two instruments should reinforce one another. CAT should be seen as an effective tool rather than a hindrance. Practice shows that this wider approach has been embraced in some States. For example, the Canadian Supreme Court has argued that “underlying the [Refugee] Convention is the international community’s commitment to the assurance of basic human rights.
without discrimination.” Accordingly, if a humanitarian approach to the plight facing those seeking asylum as refugees is favored, it is apparent that receiving States must adopt measures that seek to reinforce, rather than dilute, the already struggling asylum regime.

The idea of having a Torture Committee to monitor the eradication of torture globally is a sound one. However, its mandate and operation, and hence CAT, is significantly hampered by the requirement that communications relating to the violation of the treaty can only be considered against States that have recognized the Committee’s jurisdiction. Recently, in December 2002, the international community adopted an Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Optional Protocol) to reinforce the Torture Committee’s operational mandate. In particular, the Optional Protocol established a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to carry out regular visits to places where people are deprived of their liberty, such as prisons, and to explore preventive measures at a domestic level. If the number of States that have signed or become party to this treaty is something to rely on, it shows a commitment by members of the international community to combat torture and other inhuman treatment. This is an essential step toward fortifying the international human rights and refugee regimes. Notably, regional human rights treaties and inter-

317 See id. art. 2(1).
318 Article 4(1) of the Optional Protocol to CAT requires each State party to:

[A]llow visits . . . to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

Optional Protocol to CAT, supra note 316, art. 4(1).
319 As of November 1, 2006, fifty-four states are signatories and twenty-eight states are parties to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Office of the United Nations High Commissioner for Human Rights, Optional Protocol to the Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment, Ratifications and Reservations, http://www.ohchr.org/english/countries/ratification/9_b.htm (last visited Feb. 5, 2007).
320 See African (Banjul) Charter on Human and Peoples’ Rights art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3; American Convention, supra note 138, art. 3; European Con-
national humanitarian law\textsuperscript{321} recognize the prohibition against torture and inhuman treatment.

A State’s subscription to the wide range of international instruments does not guarantee protection to those in need. The future of CAT depends on States taking practical steps to translate the provisions of international law into real rights. Meeting international obligations requires States to undertake good faith measures that will guarantee the enjoyment of rights to citizens and strangers alike. The negative duty of States in relation to torture means that they should refrain from engaging in acts that could constitute torture and or cruel, inhuman, or degrading treatment. Thus, the diplomatic assurances that the United Kingdom and the United States are said to have entered into with Lebanon,\textsuperscript{322} as well as with Egypt\textsuperscript{323} and Syria,\textsuperscript{324} to allow for the return of persons suspected of terrorist activities is a step in the wrong direction in the global fight against torture.

Granted, Beirut, Cairo, and Damascus are said to have promised that returnees will be protected from torture or cruel, inhuman, or degrading treatment. Nevertheless, these agreements raise serious concerns. Primarily, the ability of London or Washington to effectively monitor or enforce these assurances remains questionable. Additionally, because these States are known to systematically practice torture,\textsuperscript{325} it is doubtful whether these agreements can provide returnees with an adequate guarantee of safety. Curiously, in its 2005 report, the U.S. De-


partment of State described the human rights record of both Egypt and Lebanon as awful.\textsuperscript{326} As the Torture Committee\textsuperscript{327} and regional courts like the European Court of Human Rights\textsuperscript{328} have stressed, procurement of a diplomatic assurance with a government that has a well-documented record of torture offers very little protection against future violations. The historical record affirms this position.\textsuperscript{329} Further, it is arguable that these agreements sanction the use of torture or inhuman treatment. Moreover, entering into such agreements is inconsistent with President George W. Bush’s claim that it is the policy of his Administration to “neither torture suspects nor deliver them to countries where they are likely to be tortured,”\textsuperscript{330} and Prime Minister Tony Blair’s statement that the United Kingdom “utterly condemn[s] torture in every set of circumstances.”\textsuperscript{331} In sum, policies such as these are likely to severely compromise the system of protection of those fearing torture at home.\textsuperscript{332}

Few would deny that CAT and its Optional Protocol cannot totally eradicate torture. Even so, they can add necessary impetus to an ongoing fight. We find ourselves in a world in which the self-proclaimed champions of human rights and democracy, like Australia, the United States, and the United Kingdom, have been implicated in acts of torture or inhuman treatment in the wake of the “war on terrorism.”\textsuperscript{333}

\begin{flushleft}


\textsuperscript{328} Chahal v. United Kingdom, 23 Eur. Ct. H. R. 413, 463 (1997) (where the European Court of Human Rights argued that it was “not persuaded that the [diplomatic] assurances [between the United Kingdom and India] would provide Mr. Chahal with an adequate guarantee of safety”).


\textsuperscript{332} See generally Kisoki, CAT/C/16/D/41/1996.

Thus the battle against torture must continue to be waged full force, lest the so-called “rogue States” follow the “great protectors” into a lawless abyss.

SETTLEMENT OF DISPUTES UNDER THE
CENTRAL AMERICA–DOMINICAN
REPUBLIC–UNITED STATES FREE TRADE
AGREEMENT

DAVID A. GANTZ*

Abstract: The Central America–Dominican Republic–United States Free Trade Agreement (CAFTA-DR) is one of nearly a dozen post-North American Free Trade Agreements (NAFTA) free trade agreements (FTAs) that the United States has concluded with nations in Latin America, the Middle East, and Asia since 2000. All of these newer agreements are based on NAFTA, but they differ in significant respects, particularly in the chapters relating to dispute settlement. Most significantly, the changes reflect U.S. government experience with NAFTA dispute settlement, particularly with regard to actions brought by private investors against the United States and other NAFTA governments under NAFTA’s investment protection provisions (Chapter 11). However, the changes also result from perceived (as well as actual) threats to U.S. sovereignty, as reflected in the President’s Trade Promotion Authority of 2002. It is too soon to determine whether these changes will have a significant impact on dispute settlement under CAFTA-DR; some may well lead tribunals to conclusions different from those that would be rendered under NAFTA. Government-to-government dispute settlement proceedings under CAFTA-DR, as under NAFTA, are likely to be infrequent unless the roster is promptly appointed.

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INTRODUCTION

This is an historic day for the United States and our six partners in CAFTA-DR. This free trade agreement makes stronger the bond between us and our neighbors. CAFTA-DR creates an alliance for fair trade and will promote security and stability in our region. This is a win-win agreement that benefits American workers with greater access to important markets, and our trading partners with new economic opportunities . . . . America’s support for CAFTA-DR sends a strong signal to the world that the United States is committed to market liberalization. We look forward to continuing to work with Congress and our trading partners around the world to provide global opportunities for free and fair trade through the Doha Development Agenda.1

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Settlement of Disputes Under CAFTA-DR

A. CAFTA-DR in Context

In recent years, many nations, including the United States and to a somewhat lesser extent the nations in Central America and the Caribbean, have participated in the proliferation of “regional trade agreements” worldwide. The World Trade Organization (WTO) secretariat estimates that as of the end of 2005, based on notifications to the WTO, some 300 such agreements would be in force.\(^2\)

The Central American-United States-Dominican Republic Free Trade Agreement (CAFTA-DR)\(^3\) is one in what is now an extensive list of post-North American Free Trade Agreement (NAFTA) free trade agreements (FTAs) concluded by the United States. Since 1999, the United States has concluded FTAs with Jordan,\(^4\) Singapore,\(^5\) Chile,\(^6\)

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\(^3\) Central American-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited May 5, 2007) [hereinafter CAFTA-DR]. The agreement is in force for the United States, Guatemala, El Salvador, Honduras, Nicaragua, and the Dominican Republic. The Agreement was expected to enter into force for Costa Rica before the end of 2007. The United States, pursuant to an amendment to Chapter 22, has been implementing the Agreement on a country-specific basis. The amendment provides in pertinent part that:

this Agreement shall enter into force for any other signatory [after the first, El Salvador] on such date as the signatory and the United States shall specify in an exchange of diplomatic notes certifying that the signatory has completed its applicable legal procedures. Promptly after completing the exchange of diplomatic notes, the signatory shall notify the Depositary in writing of the date the Agreement shall enter into force for it. Unless the Parties otherwise agree, the Agreement shall not enter into force for it. Unless the Parties otherwise agree, the Agreement shall not enter into force for any signatory after two years from the entry into force of the Agreement.


\(^4\) See Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 [hereinafter Jordan FTA]. This was a “bare-bones” agreement by current standards, with less than 20 pages of text compared to hundreds with all of the other FTAs, and the only one concluded after NAFTA by the Clinton Administration. See id.


\(^6\) See U.S.-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026 [hereinafter Chile FTA].
Morocco,\textsuperscript{7} Peru,\textsuperscript{8} Australia,\textsuperscript{9} Colombia,\textsuperscript{10} Oman,\textsuperscript{11} and Bahrain.\textsuperscript{12} All of these agreements, except those with Peru and Colombia, have received U.S. and foreign congressional approval, and are or will soon be in force. Negotiations continue at various levels of intensity with the remaining agreements.\textsuperscript{13} With the suspension of the WTO’s “Doha Development Round” of global trade negotiations,\textsuperscript{14} it seems reasonable to assume that the United States and other major trading nations will maintain or even step up their efforts to conclude more regional trade agreements,\textsuperscript{15} even though opposition in Congress and the likely expiration of the President’s Trade Promotion Authority on June 30, 2007\textsuperscript{16} will likely make it difficult for the Bush Administration to undertake major new FTAs, except perhaps for the agreement under negotiation with South Korea.

The Central American nations have experience with regional trade agreements that pre-dates that of the United States. The initial instrument designed to create a common market in Central America

\textsuperscript{8} See U.S.-Peru Trade Promotion Agreement, U.S-Peru, Apr. 12, 2006, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter Peru FTA].
\textsuperscript{13} See generally Office of the United States Trade Representative Bilateral Agreements, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Feb. 13, 2007) (listing various bilateral trade agreements including those currently being negotiated between the United States and Malaysia, Panama, Republic of Korea, Thailand, and United Arab Emirates).
\textsuperscript{14} Daniel Pruzin & Christopher S. Rugaber, WTO’s Doha Round Talks Collapse, as G-6 Meeting Ends in Acrimony, 23 INT’L TRADE REP. (BNA) 1120 (July 27, 2006).
\textsuperscript{15} See Steven Chase, WTO Talks Collapse after 5 Years, GLOBEANDMAIL.COM, July 24, 2005, http://www.theglobeandmail.com/servlet/story/LAC.20060725.RWTO25/TPStory?query=wtom (commenting that “trade watchers” expect more bilateral free trade deals, with the “spaghetti bowl” effect of different agreements that hamper global commerce).
was signed in 1960, even though its full implementation has been delayed by more than forty years of civil war and the lack of political will to deal with well-entrenched business and labor interest groups. The fact that most duties for trade within the five nation region (the Dominican Republic is not a party) have finally been eliminated, and that the common external tariff has been substantially implemented, can likely be traced in significant part to the anticipation of CAFTA-DR, and the need to increase Central American industrial competitiveness vis-à-vis Asia.

There are also a number of bilateral FTAs between CAFTA-DR members and other nations. Among the outside nations that have negotiated FTAs with Central American nations are Mexico (Guatemala, El Salvador, Honduras); Chile (all); the Dominican Republic (all); Panama (all); Colombia (Guatemala); and Venezuela (Guatemala). The Dominican Republic’s only regional trade agreement, other than CAFTA-DR and the one with the Central American states, is a more limited, older (1973) agreement with Panama. Costa Rica has concluded an FTA with Canada, and has concluded FTAs or similar agreements with the Caribbean group CARICOM, Panama, Mexico, Colombia, and Venezuela. The Central American nations (except Costa Rica) have been negotiating an FTA with Canada for at least four years, but to date no agreement has been reached. It was expected that negotiations of a long-discussed FTA between Central America and the European Union would be initiated before the end of 2006, although this does not

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23 The negotiations were initiated in the fall of 2001, with the most recent negotiations held in February 2004. See Foreign Affairs and Int’l Trade Canada, Canada-Central America Four Free Trade Negotiations, http://www.dfa-it-maeic.gc.ca/tna-nac/ca4-en.asp (last visited Feb. 13, 2007).
seem to have occurred. However, many of the non-U.S. agreements do not have full coverage of areas such as investment and intellectual property.

All of the NAFTA Parties have attempted FTAs with Central America, but only the United States has managed to conclude one with all five of the Central American nations. The United States has the most to offer with regard to market access for both agricultural and manufactured goods, even if, as one observer has rather critically put it, that “access involves idiosyncratic rules, self-defeating trade-offs, uneven playing fields, and political benefits overshadowing economic costs. The U.S. sets the standards . . . .” For Canada, it may be that concluding negotiations is more difficult where development preconditions, human rights, democratic governance, and the like are preconditions for negotiations, all of which only Costa Rica has met. For Mexico, it has been possible to conclude agreements with the northern Central American nations despite somewhat differing historical relationships and earlier frictions. However, given the large number of Mexican FTAs with various countries both within and outside Latin America, it is not surprising that most of the Central American nations (except Nicaragua) are included.

The U.S. FTAs, including CAFTA-DR, while varying considerably in their content and coverage, share far more similarities than differ-

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27 Id. at 57.
28 Id. at 54–55.
29 See SICE, Information on Mexico, http://www.sice.oas.org/ctyindex/MEX/MEXagreements_e.asp (last visited Apr. 30, 2007) (citing more than one dozen Mexican FTAs).
ences. All are extensively patterned after NAFTA, in that they are comprehensive agreements that deal with tariff and non-tariff barrier elimination for trade in goods (including extensive, but not full coverage, of agriculture), rules of origin, and include chapters on standards, sanitary and phytosanitary measures, government procurement, intellectual property (with some rules going beyond the requirements of the WTO’s Agreement on Trade Related Intellectual Property (TRIPS)), services, investment, rudimentary competition law, labor rights, and the environment. As with all post-NAFTA U.S. FTAs, CAFTA-DR treats labor rights and environmental protection in the body of the Agreement rather than in separate “side” agreements.

CAFTA-DR consists of twenty-two chapters, most with self-contained annexes; a “market access” annex (rules of interpretation); product specific rules of origin (143 pages); Annex I (specific exceptions on a country-specific basis); Annex II (additional non-conforming measures); Annex III (financial services non-conforming measures); tariff schedules for each of the seven Parties; and an extensive series of “side letters,” again on a country by country basis. This means, of course, that there are few CAFTA-DR legal questions that can be answered safely by simply reviewing one or two provisions, or even one annex. With investment, in particular, not only Chapter 10, but also Annexes I and II, are likely critical to any analysis.

With a few exceptions—Australia, Singapore, and South Korea (if successfully negotiated)—all post-NAFTA U.S. FTAs are with developing (or near-developing) countries, particularly small developing coun-

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34 CAFTA-DR, supra note 3, passim.
tries such as those in Central America and the northern half of South America. Since trade with none of these FTA partners—with the possible exception of Singapore and South Korea—is in itself significant for the United States (particularly compared to NAFTA), one needs to be aware of other important U.S. interests that may be advanced by the accords. These include security issues with regard to Jordan, Oman, Morocco, Bahrain, and Singapore, and the advancement of economic development/democratic institutions/rule of law with CAFTA-DR, Peru, Colombia, and Ecuador (discussed in more detail below).

B. The Importance of Dispute Settlement Provisions in FTAs

While there are many areas of these agreements that could benefit from close analysis by those who will be directly affected by them—including but not limited to rules of origin, transparency, trade facilitation, environmental protection, and labor protection—this Article focuses on the area of dispute settlement, specifically those involving foreign investment and those relating to disagreements among the State Parties over the application and interpretation of the FTAs. NAFTA’s investment dispute Chapter 11 has been one of the most widely used—and controversial—of all NAFTA mechanisms, with the Chapter 20 government-to-government mechanism less used. Taken together, the three major areas of NAFTA dispute settlement, Chapter 11 (investment), Chapter 19 (review of antidumping and countervailing duty administrative actions), and Chapter 20 (general dispute settlement), have involved literally hundreds of proceedings over a thirteen year period.  

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(The separate NAFTA side agreements on labor and environment have also generated numerous citizen complaints, but no arbitrations.\textsuperscript{37})

The task of analyzing CAFTA-DR dispute settlement is considerably easier than with NAFTA, since there are only two major mechanisms, for investment and for government-to-government disputes. Labor and environmental obligations have been merged into the text of the Agreement; they are no longer separate, and are thus discussed in the context of government-to-government dispute settlement. In addition, the NAFTA Chapter 19 mechanism for review of unfair trade actions has not been replicated in CAFTA-DR, or in any other U.S. FTA.\textsuperscript{38}

Investment is a key element of U.S. FTAs, beginning with the U.S.-Canada FTA in 1988. Nor, apparently, is the U.S. alone. According to a recent U.N. Conference on Trade and Development (UNCTAD) study, “[i]nternational investment rules are increasingly being adopted as part of agreements that address inter alia trade and investment.”\textsuperscript{39} The region is not a major destination for U.S. direct foreign investment; as of 2005, aggregate foreign direct investment (FDI) for the six CAFTA-DR countries was only about four billion dollars, roughly five percent of U.S. FDI in Mexico, and flows were erratic.\textsuperscript{40} While there appears to be little empirical data demonstrating that investment protection agreements directly stimulate FDI, it seems intuitive to believe that a more favorable investment climate could be an important factor in encouraging foreign investment in small markets with few natural resources. Investment agreements, along with political stability, a well-functioning legal system, educated workers, reasonable labor and tax laws, and good infrastructure, are relevant to in-


\textsuperscript{38} The reasons for this are somewhat complex. See NAFTA Dispute Settlement, supra note 36, at 14–23.


\textsuperscript{40} See U.S. Dept. of Commerce Bureau of Econ. Analysis, Int’l Econ. Accounts, http://www.bea.gov/bea/di/usdctry/longctry.htm (last visited Jan. 24, 2007). FDI for the six CAFTA-DR countries was $3.989 billion, compared to $71.423 billion for Mexico. Id.
vestment decisions. In any event, U.S. FTAs almost invariably include investment protection provisions, and well prior to the CAFTA-DR, three of the six developing State Parties had negotiated bilateral investment treaties with the United States.

Additionally, with seven Parties instead of three, six of which are at a significantly lower stage of economic development and experience with international economic agreements than any of the NAFTA parties, disputes regarding the application and interpretation of the Agreement are almost inevitable. While the Parties are all members of the WTO, and thus have available the WTO’s Dispute Settlement Body (DSB), the various provisions of CAFTA-DR that are not covered by the WTO agreements, including but not limited to provisions on labor and environment, and some of those in the intellectual property area, make at least some Chapter 20 disputes likely.

This Article is intended both to explain the dispute settlement provisions, and to highlight the differences in CAFTA-DR as compared to NAFTA. It is not, however, a comprehensive analysis of the NAFTA jurisprudence, particularly the many tribunal decisions under the NAFTA Chapter 11 investment provisions. In the analysis, I have tried to steer a middle ground between readers with sophisticated expertise in investment agreements and investor-state arbitration, and those who are newer to the area, realizing that some of the commentary will be overly simplistic for some, and perhaps too complex for others, for which I apologize in advance.

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41 A recent study concludes that bilateral investment treaties (and, presumably, similar provisions of FTAs) “do indeed have a positive impact on FDI flows to developing countries,” as a signal of welcome to foreign investors, but that conclusion of a BIT alone does not permit developing countries to “avoid the hard work of improving their own domestic environment as it affects the political risks of investment.” Jennifer Tobin & Susan Rose-Ackerman, When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties, Nov. 14, 2006, at 31, available at http://www.law.yale.edu/documents/pdf/When_BITs_Have_Some_Bite.doc.

42 The Australia FTA lacks mandatory investor-state arbitration. See generally Australia FTA, supra note 9. There are no investment provisions in the Jordan FTA, but the U.S. and Jordan concluded a bilateral investment treaty in 1997 that entered into force in 2003. See USBIT Program, supra note 32.


45 See generally NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004) (discussing various aspects of Chapter 11 dispute settlement, including the case law).
Part II constitutes a brief summary of CAFTA-DR and its objectives, primarily but not exclusively from the point of view of the United States. It attempts to answer, at least in part, perhaps the most obvious question—why did the U.S. government devote an enormous volume of negotiating resources, and considerable political capital, to secure the conclusion and congressional approval of an FTA that, when fully in force, will produce only about as much annual trade as NAFTA does in three weeks?

Part III focuses on CAFTA-DR Chapter 10, Section A, the protections for foreign investors afforded under the Agreement. Part IV discusses the actual process of investor-state international arbitration, as structured in Section B of Chapter 10. Both draw on other sections of CAFTA-DR, including the Chapter 11 definitions and annexes, and general annexes I and II. All of these provisions are patterned closely, but by no means slavishly on NAFTA’s Chapter 11, with changes reflecting the NAFTA experience. More recent FTAs, such as those with Colombia and Peru, contain further innovations, including the treatment of foreign debt restructuring under the investment chapter.

Part V discusses the government-to-government dispute settlement mechanism created under CAFTA-DR Chapter 20, with particular attention to a series of procedural additions. It also addresses a potential increase in jurisdiction resulting from the inclusion of labor and environment provisions in the body of CAFTA-DR, rather than in side agreements as under NAFTA. Part VI attempts to draw some conclusions as to how the dispute settlement mechanisms will function under CAFTA-DR.

At the risk of stating the obvious, since CAFTA-DR is not yet fully in force, any commentary about the likely usage rate of its dispute settlement provisions is largely speculative, although some predictions are based on the NAFTA experience. My best guess is that the overall numbers will be lower, since CAFTA-DR does not incorporate a mecha-


47 See, e.g., U.S.-Peru Trade Promotion Agreement, U.S.-Peru, Annex 10-F, Apr. 12, 2006, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload _file483_9547.pdf (last visited Feb. 13, 2007) (providing that no award may be made for default or non-payment of public debt unless there is a tribunal finding of expropriation or breach of another Section A obligation; commercial risks involved in the purchase of public debt are excluded).

48 See supra note 3.
nism for review of administrative determinations in unfair trade, actions along the lines of NAFTA’s Chapter 19.\(^49\) These usage rates may, however, be affected by the manner in which the Free Trade Commission under the Agreement goes about implementing various procedural steps, such as appointing the roster of potential arbitrators for government-to-government disputes.\(^50\) The Commission will not likely address those questions until the Agreement has gone into force for all of the Parties.\(^51\) In the end, as with NAFTA, the viability of the dispute settlement mechanisms, particularly Chapter 20, will depend on whether the governments implement them in good faith.

I. The Broader Significance of CAFTA-DR

CAFTA-DR is concerned first with increasing trade among the Parties, particularly the volume of two-way trade between the United States and each of the other State Parties. However, the Agreement is probably as much a vehicle for economic development as it is for trade expansion per se, more so than NAFTA or any other earlier FTA, in areas such as rule of law, “trade capacity building,” customs procedures, regulatory transparency, private property rights, competition, “civil society” participation, environmental protection, and labor law. Forty-five years after the General Treaty on Central American Economic Integration was concluded in 1960, CAFTA-DR, along with promised negotiations of an FTA with the European Union, might provide the necessary impetus for the Central American nations to complete the customs union and harmonization of commercial law that was agreed to so long ago.\(^52\)

The U.S. Trade Representative’s (USTR) statement at the signing of the CAFTA-DR, quoted at the beginning of this article, sums up the multiple U.S. motives for the FTA. Those considerations included strengthening economic and other ties with six small nations, none of them major U.S. trading partners, but most—Guatemala, El Salvador, the Dominican Republic, Nicaragua—nations in which the United States has politically intervened in the past, sometimes with disastrous

\(^{49}\) Neither CAFTA-DR, nor any of the other post-NAFTA U.S. FTAs, nor any post-NAFTA FTAs concluded by Canada or Mexico, replicate the NAFTA Chapter 19 provisions. See NAFTA, supra note 30, ch. 19. See generally CAFTA-DR, supra note 3.

\(^{50}\) CAFTA-DR, supra note 3, ch. 20, art. 20.7.

\(^{51}\) Telephone Interview with USTR Lawyer (Aug. 17, 2006).

Security and stability in the region, perhaps with a greater concern for democracy than in the past, remains a U.S. objective in the post 9/11 world, as does illegal immigration from the region. As another USTR document noted: “In the 1980s, Central America was characterized by civil war, chaos, dictators, and Communist insurrections. Today, Central America is a region of fragile democracies that need U.S. support . . . . CAFTA-DR is a way for America to support freedom, democracy and economic reform in our own neighborhood.”

Second, probably more for U.S. domestic audiences, “fair” trade is designed, through the use of market forces and the creation of “economic opportunities,” to stimulate economic development, job growth, and exports. This is more than lip service, given the extensive CAFTA-DR provisions on trade facilitation and trade capacity building, but it does not extend to market opening in sugar; USTR boasted that increased sugar imports from the region—a major producer—amounted to only a bit more than one day’s U.S. production. Even though trade volumes are small compared to NAFTA, in 2004, the roughly fifteen billion dollars in exports to the six CAFTA-DR nations made the group the fourteenth largest U.S. export market worldwide, and second after Mexico in Latin America. For the Central American nations, the United States is the most important market, representing from about thirty-five percent to over eighty percent of total trade, and for some sectors, such as apparel, U.S. market access is significantly expanded. Trade with the United States is thus far more important to those countries than to the United States.

55 See CAFTA-DR, supra note 3, ch. 5.
56 See id. ch. 19(B).
57 CAFTA Facts, supra note 54, at 2.
59 See U.S. Dep’t of State, Background Notes, http://www.state.gov/r/pa/ei/bgn/ (last visited Feb. 13, 2007) (specifically: Costa Rica, at 2; Dominican Republic, at 2; El Salvador, at 1; Guatemala, at 2; Honduras, at 2; and Nicaragua, at 2).
60 Despite the sensitivity of textiles and apparel, some significant additional market opportunities were afforded in that sector, but with duty-free, quota-free entry permitted
Third, CAFTA-DR (and other FTAs like it) were intended to be a demonstration of the U.S. commitment to freer trade (and perhaps a not so veiled threat) at the global as well as the regional level, including the likelihood that if not everyone will seek these goals, the United States will negotiate with those who will.\footnote{61}

Unmentioned in Ambassador Portman’s statement, but highlighted elsewhere,\footnote{62} was the fact that CAFTA-DR contains language designed to protect, to at least some degree internationally, recognized labor rights and the environment.\footnote{63} These controversial (and to some, overly weak) provisions, which almost led to the defeat of CAFTA-DR in Congress because of Democratic opposition,\footnote{64} are largely beyond the scope of a discussion of CAFTA-DR dispute settlement, except to a limited degree in Part V. The post-NAFTA U.S. FTAs make the labor and environmental provisions—whether or not considered otherwise sufficient—subject to the general dispute settlement mechanism (Chapter 20 in CAFTA-DR), rather than to separate agreements as is the case with NAFTA.

II. **Investment Protection Under CAFTA-DR Chapter 10**

Despite the differences among U.S. FTAs, an understanding of NAFTA is essential to an understanding of the newer FTAs. With such understanding, a person with reasonable expertise in NAFTA can attain similar expertise in dealing with the provisions of CAFTA-DR and other similar agreements relatively quickly. This seems particularly true with regard to protection of investment provisions. As with NAFTA, CAFTA-

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\footnote{61} The signing of CAFTA-DR came at a time when it was becoming more and more obvious that the United States’ initiative for a “Free Trade Area of the Americas” was floundering and would likely be abandoned. \textit{See}, e.g., Gantz, \textit{FTAA}, supra note 52, at 183–192 (exploring the reasons why the FTAA seemed doomed to failure).

\footnote{62} USTR termed these as “Strong Protections for Labor and the Environment,” noting that the agreement provisions were designed to focus on assisting the CAFTA-DR nations in enforcing core ILO principles. CAFTA Facts, \textit{supra} note 54, at 1.

\footnote{63} CAFTA-DR, \textit{supra} note 3, chs. 16, 17. CAFTA Facts, \textit{supra} note 54, at 2.

DR’s investment chapter is divided into three major sections, investment, investor-state dispute settlement, and definitions. In addition, as with NAFTA, CAFTA-DR contains a series of annexes reserving the right to temporarily or permanently reject or limit foreign investment in certain sectors. However, unlike NAFTA, CAFTA-DR also contains a series of investment specific reservations, clarifications, and procedural requirements, many of which are discussed in this section or in Part IV.

A. The NAFTA Background and Influence

NAFTA’s investment provisions were anything but radical when incorporated into the agreement. The obligations to investors language (Section A) was taken in significant part from the U.S.-Canada Free Trade Agreement, and both the obligations to investors and the dispute settlement provisions (Section B) reflected what at the time was more than a decade of U.S. experience concluding bilateral investment treaties (BITs) with various developing nations. By the time CAFTA-DR was negotiated, the negotiators (presumably for all parties) were aware of extensive investor-state litigation under NAFTA, some of which was relevant and some of which was not to the situation of the six CAFTA-DR parties. That history—and Congressional perception of it—caused a significant reshaping of the CAFTA-DR investment provisions as compared to NAFTA’s investment provisions.

As far as I have been able to determine, none of the NAFTA negotiators thought much about NAFTA’s major departure from the BITs negotiated earlier; all of the earlier agreements with mandatory investor-state arbitration were with developing, capital importing nations, rather than with developed, capital exporting (as well as importing) nations, such as Canada. The conventional wisdom seems to have been an assumption that the Chapter 11 provisions would be used almost exclusively by United States and Canadian investors in Mexico, and hardly ever by Mexican investors against Canada and the United

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States, simply because both the United States and Canada maintained highly developed legal systems with independent, non-corrupt, and well-educated judiciaries. Why, under those circumstances, would anyone prefer international arbitration to domestic courts?

In retrospect, this view may seem naïve, but at the time it seemed logical enough, and the likelihood of multiple disputes between United States investors and Canada, or vice versa, did not appear to be a matter for concern.\textsuperscript{67} Even if the concerns had been raised, they probably would not have significantly changed the agreement. Protection for foreign investors was a key objective of NAFTA (since job creation in Mexico was thought to depend on it), and there was no precedent for including such provisions in an FTA or BIT unless they were equally applicable to all parties.

The volume of U.S.-Canada investment is sufficiently enormous—$175 billion from the United States to Canada and $134 billion from Canada to the United States\textsuperscript{68}—to assure that there are at least a few actual or potential disputes with each host government. Additionally, there is a sufficient cadre of well-trained, aggressive, and creative attorneys in each country, even given the well-respected national court systems, so that testing of the limits of investment treaty protections might have been anticipated. Finally, there is probably no government on earth in which regulatory actions couched in terms of protecting the environment or worker rights or other worthwhile purposes are not in fact occasionally taken for protectionist purposes, or are simply arbitrary, discriminatory, or unreasonable. In any event, in actual experience, of the roughly forty-two matters notified to the NAFTA Parties under Chapter 11, almost two thirds have been by U.S. investors against Canada, or Canadian investors against the United States.\textsuperscript{69}

\begin{flushleft}
\textsuperscript{67} Gantz, \textit{Evolution}, supra note 46, at 693–95 (discussing these issues at greater length).
\textsuperscript{68} U.S. Dept. of State, Background Note: Canada, July 2006, at 5, \textit{available at} http://www.state.gov/r/pa/ei/bgn/2089.htm (last visited May 5, 2007).
\textsuperscript{69} This is based on the best information available regarding the number of “notices of intent to submit a claim to arbitration” under NAFTA, Article 1119. NAFTA, \textit{supra} note 30, art. 1119. It can be reasonably argued that this is an imperfect measure, since not all such notices of intent resulted in actual claim submissions under NAFTA, Article 1120, and even fewer were pursued through arbitration. \textit{See id.} art. 1120. On the other hand, it is at least possible that other notices of intent were filed which have never become public. Regardless of what criterion is used, there have been a significant number of proceedings in which American investors brought claims against Canada, and vice versa. In the author’s view, the best source of information on NAFTA claims—and by far the easiest to navigate—is a proprietary but free website managed by attorney Todd Weiler, http://www.nafta-claims.com, which has fewer gaps than the three government websites. \textit{See} NAFTA Claims, http://www.nafta-claims.com (last visited Feb. 13, 2007).
\end{flushleft}
NAFTA’s experience has thus been a particularly educational, if occasionally painful, one for the NAFTA governments, including the United States, whose government lawyers are no more fond of losing court or arbitral decisions than other attorneys, and whose Members of Congress or Parliament do not particularly want to spend taxpayer money on foreign investor claims. This concern persists despite the fact that the United States has never lost a NAFTA tribunal decision that found it in violation of NAFTA or required it to compensate a foreign investor. To the extent possible, the perceived errors in opening too wide the doors in NAFTA Chapter 11 would not be made in subsequent FTA investment chapters or BITs.

Some of the specific government and congressional concerns are discussed below, in the analysis of certain CAFTA-DR Chapter 10 provisions. The most notable relate to: (1) the types of conflicts between legitimate government regulatory actions (particularly those designed to protect the environment) and “ takings” that would be compensable under the Fifth Amendment to the U.S. Constitution;70 (2) NAFTA tribunal review of decisions of national courts; and (3) the possibility that foreign citizens bringing NAFTA investment claims may end up with greater rights than what U.S. citizens facing the same governmental action would have under what may be their only available remedy, the Fifth Amendment to the U.S. Constitution.

In particular, criticism has focused on two actions against the United States, Methanex v. United States71 and Loewen Group v. United States.72 The first involved an alleged “regulatory” taking, based on a California decision to ban a gasoline additive, MTBE, allegedly on health grounds, to the detriment of Methanex’ methanol production operations. The original tribunal dismissed the claim because Methanex lacked a sufficient nexus under the “relating to” language under NAFTA, Art. 1101, since Methanex did not produce MTBE, but only its


72 See generally Loewen Group Inc. v. United States (Award), 42 I.L.M. 811 (2003); Loewen Group, Inc. v. United States (Decision on Request for Consideration), 44 I.L.M 836 (2005).
prime ingredient, methanol.\textsuperscript{73} Ultimately, all claims against the United States were dismissed either on jurisdictional grounds or on the merits,\textsuperscript{74} but not before the lengthy proceedings raised serious concerns among non-governmental organizations (NGOs) and some Members of Congress over the prospect of such environmental action costing the United States or California hundreds of millions of dollars, and resulting in a chilling effect on necessary government regulation in the future.

\textit{Loewen} raised the specter of NAFTA review, ultimately on denial of justice grounds, of a decision of a Mississippi state court. That case was ultimately dismissed on procedural grounds and for failure of one of the claimants to exhaust his local remedies as required under international law, but only after the tribunal characterized the Mississippi proceedings as a “disgrace.”\textsuperscript{75} In fact, it established a very high standard—denial of justice under international law—for effective second-guessing of a national court decision.

These cases led to various public objections, and ultimately to negotiating objectives and guidelines (not mandatory, but to be ignored only at the President’s peril) for future investment provisions in international trade agreements and BITs. These guidelines were embodied in the 2002 U.S. Trade Promotion Authority, which allows the President to negotiate future trade agreements and BITs:

\begin{quote}
[T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, \textit{while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States}, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by—

(A) reducing or eliminating exceptions to the principle of national treatment:

. . .

(D) \textit{seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice};
\end{quote}

\textsuperscript{73} See Methanex I, 42 I.L.M. 514, ¶ 172(2).

\textsuperscript{74} See Methanex II, Final Award on Jurisdiction and Merits, at 300, http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf.

\textsuperscript{75} See Loewen, 42 I.L.M. at 830, 833, 846, 850. See generally Loewen, 44 I.L.M 836.
(E) seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process . . . .

Thus, as one U.S. government attorney put it:

Each of the United States’ post-NAFTA agreements embodies changes that reflect the negotiating objectives . . . . Many of these objectives, as well as the resulting changes made to the agreements, have their origin in the United States’ experience with NAFTA Chapter Eleven arbitration. In broad terms, the significant changes include the clarification of standards of certain substantive provisions, as well as modifications made to promote the transparency of investor-State arbitration, improve the efficiency of arbitrations, deter the filing of frivolous claims, and ensure the consistency of interpretations of similar obligations across agreements.

It was in this context, therefore, that the U.S. negotiators proceeded with the negotiations of the Singapore and Chile FTAs (the first two to use modified investment language), and with CAFTA-DR.

B. CAFTA-DR’s Investor Protections

At the outset, several important distinctions between NAFTA and CAFTA-DR that affect investment should be noted, even at the risk of stating the obvious. First, except for the United States, the other CAFTA-DR parties are developing nations, with relatively little investment in the United States, as is the case with most U.S. bilateral investment treaties, despite their being reciprocal in their included rights and obligations. Thus, there is likely to be relatively little investor-related litigation directed at the United States. Secondly, six of the seven parties to the CAFTA-DR are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), to which neither Canada nor Mexico has adhered. In practical terms, this means that the normal

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International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules\textsuperscript{79} and secretariat services are available for investor-state disputes (in addition to other rules), except for the Dominican Republic, while under NAFTA, only the ICSID Additional Facility Rules are available at ICSID.\textsuperscript{80}

Third, while U.S. firms (and Canadian firms) have in the past made significant use of investor-state arbitration in the NAFTA context and otherwise, there is little history of investor-state dispute settlement among the member countries of CAFTA-DR other than the United States.\textsuperscript{81} Whether this is due more to significant efforts to resolve disputes through negotiation, the high cost of international arbitration, relatively low volumes of intra-Central American investment, cultural differences, or some other factor or factors is beyond the scope of this discussion.

Fourth, the text of Chapter 10, which is highly similar to the investment provisions of earlier U.S. agreements, strongly suggests that Chapter 10 is essentially a U.S. originated (rather than a jointly negotiated) document. The other six Parties’ input appears limited primarily to the reservations and certain limitations in the party-specific annexes, particularly with respect to sectors in which national treatment is not required for foreign investors. As the USTR Summary of the Agreement states:


\textsuperscript{80} The Additional Facility Rules are available to disputes where either the investor or the host state is an ICSID party, but not both. They would be available for any disputes under NAFTA as between the U.S. and Mexico or the U.S. and Canada, but not between Mexico and Canada. See ICSID, ICSID Additional Facility Rules (2006), available at http://www.worldbank.org/icsid/facility/AFR_English-final.pdf (last visited Feb. 13, 2007) [hereinafter ICSID Additional Facility Rules].

\textsuperscript{81} Of 106 completed and 104 pending ICSID and ICSID Additional Facility cases, only two have involved a Central American country (Costa Rica and El Salvador), and none were between Central American-DR nations and investors. See ICSID, List of Concluded Cases, http://www.worldbank.org/icsid/cases/conclude.htm (last visited Feb. 13, 2007); ICSID, List of Pending Cases, http://www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 13, 2007).
Its [Chapter 10] provisions reflect traditional standards incorporated in early U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties) and in customary international law, and contain certain innovations incorporated in the [U.S.] free trade agreements with Chile and Singapore as well as others. 82

The basic text appears to have been imposed (with or without objection) on the other negotiating parties.

Fifth, the NAFTA case law (and other investor-state case law) is relevant to possible investor-state arbitrations under CAFTA-DR, despite that fact that “[a]n award made by a [CAFTA-DR] tribunal shall have no binding force except between the disputing parties and in respect of the particular cases.” 83 The issue is not “binding force” or precedent, but whether tribunal members, likely experienced arbitrators from one or more of the CAFTA-DR parties and/or from outside the region, will pay attention to prior tribunal decisions on the same or similar issues, particularly when rendered under legal provisions that are identical or closely similar. Experience under NAFTA has demonstrated that tribunal members consider and discuss earlier arbitral decisions, even if tribunal members do not necessarily treat them as binding precedent. Even if the tribunal members did not wish to do so, they usually have little choice, because both the investor and the host state will cite prior decisions that tend to support their arguments before the tribunal. In future investor-state arbitrations under CAFTA-DR, the parties will likely refer the tribunals to prior NAFTA and to any other arbitral decisions that involve the interpretation of similar treaty provisions.

83 See CAFTA-DR, supra note 3, ch. 10, art. 10.26.4.
1. Coverage of Investments and Investors

As with NAFTA,\(^84\) CAFTA-DR investment coverage is broad, applying to “measures adopted or maintained by a Party relating to . . . investors of another party” and to “covered investments.”\(^85\) The “covered investments” are defined broadly to include: (1) an enterprise; (2) shares of stock or other forms of equity participation; (3) loan instruments; (4) futures, options, and other derivatives; (5) turnkey, construction, concession, and other contracts; (6) intellectual property rights; (7) licenses, authorizations, and permits issued under domestic law; and (8) various tangible, intangible, movable or immovable property, and related property rights.\(^86\) However, not all transactions taking one of these forms will be covered “investments.” Among other things, the investment must have “the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”\(^87\)

Claims with regard to sovereign debt instruments are covered, but if the claim relates to a short-term instrument (less than one year), the claim cannot be filed until more than one year from the date of events (e.g., default) on which the claim is based.\(^88\) An order or judgment from a court or administrative tribunal is not an investment.\(^89\) Not only direct governmental actions, but also actions by state enterprises and others exercising regulatory or administrative authority are covered.\(^90\) Except with regard to performance requirements and investment and environment,\(^91\) Chapter 10 is not applicable to an “act or fact . . . or any situation that ceased to exist before the date of entry into force of this Agreement.”\(^92\) This language presumably es-

\(^{84}\) Many BITs also define investment broadly, and ICSID tribunals, despite the requirement in Article 25(1) of the ICSID Convention that a dispute must involve an investment, have tended to take an expansive view of the concept. See Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience*, 8 L. & Bus. Rev. Am. 501, 513–16 (2002) (discussing the treatment of a dispute involving purchase of certain debt instruments as a dispute over an investment).

\(^{85}\) CAFTA-DR, *supra* note 3, ch. 10, art. 10.1.1. A “covered investment” is defined in Article 2.1 as an investment, defined in Article 10.28 (Definitions) “in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter . . . .”

\(^{86}\) Id. ch. 10, art. 10.28.

\(^{87}\) Id.

\(^{88}\) See id. Annex 10-E, ¶ 3.

\(^{89}\) See id. ch. 10, art. 10.28.

\(^{90}\) CAFTA-DR, *supra* note 3, ch. 10, art. 10.1.2.

\(^{91}\) Id. ch. 10, arts. 10.9, 10.11.

\(^{92}\) Id. ch. 10, art. 10.1.3.
tablishes a basic rule of non-retroactivity, but would not bar a claim based on a course of conduct by a party violating the Section A obligations that began before entry into force but continued afterward.

The definition of “investor of a Party” is also broad. It includes “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party.”93 (The state enterprise is apparently covered only when it exercises regulatory, administrative, or other governmental authority that has been delegated to it by the government.94) However, unlike many bilateral investment treaties, CAFTA-DR deals explicitly with the dual national problem, since the benefits of Chapter 10 are available to “investors of another party.”95 That is, the benefits are not available to Party’s own national for an investment in its own territory. Consequently, Chapter 10 provides that a natural person claiming jurisdiction under the Agreement “shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.”96 This effectively codifies the general principle of international law applicable to dual nationals.97

Consistent with this approach, the Agreement also permits a Party to deny Chapter 10 benefits to companies nominally operating in another Party, if the owners have no substantial business activities within CAFTA-DR other than in the Party denying the benefits, and persons of a non-Party, or of the denying Party, are the owners of the enterprise.98 This language deals with two different situations. First, it has presumably been intended, at least in part, to preclude nationals of one CAFTA-DR Party (e.g., Guatemala) from using a corporation formed in the United States (without substantial business activities there) from seeking the benefits of protection under Chapter 10 for their investments in Guatemala. Secondly, if, for example, a Korean firm sets up a corporate subsidiary in Nicaragua, but has no substantial business activities in Nicaragua, the Nicaraguan subsidiary lacks standing to bring a Chapter 10 action against the United States based on the Korean firm’s investment in the United States.

93 Id. ch. 10, art. 10.28.
94 Id. ch. 10, art. 10.1.2.
95 CAFTA-DR, supra note 3, ch. 10, art. 10.1.1(a).
96 See id. (referring to Annex 2.1).
98 CAFTA-DR, supra note 3, ch. 10, art. 10.12.2.
CAFTA-DR, like NAFTA, also prevents the Parties from having to offer Section A benefits to nationals of nations with which the offering Party does not have diplomatic relations or where rules and regulations on prohibited transactions would be violated.\(^99\) This is presumably designed to prevent, for example, a Cuban-owned enterprise in one of the CAFTA-DR countries from enforcing Chapter 10 rights against the United States.

The provisions of Chapter 10 prevail against inconsistent provisions in other chapters generally, but do not apply with regard to government measures that may also be covered by the financial services chapter (12).\(^100\)

2. National Treatment and Most Favored Nation Treatment

The key protections in most investment protection agreements are those relating to national treatment, most favored nation treatment, fair and equitable treatment and expropriation, and these provisions of NAFTA are those that have been subject to the greatest volume of litigation.\(^101\) The concept of national treatment, as reflected in CAFTA-DR Article 10.3, is simple in theory:

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.\(^102\)

Applying such a non-discrimination principle is not always easy in practice. Among the issues that have arisen under NAFTA are what constitutes “in like circumstances” and whether there must be evidence of intent to discriminate, with the key decisions being *Pope & Talbot v. Canada*\(^103\) and *S.D. Myers*.\(^104\) The former related to a dispute

\(^{99}\) *Id.* ch. 10, art. 10.12.1.
\(^{100}\) *Id.* ch. 10, art. 10.2.
\(^{101}\) See NAFTA, *supra* note 30, arts. 1102, 1103, 1105, 1110.
\(^{102}\) CAFTA-DR, *supra* note 3, at ch. 10, art. 10.3.
\(^{103}\) See *Pope & Talbot v. Can.* (Pope & Talbot III), Award on the Merits of Phase Two, Fair and Equitable Treatment (NAFTA Arbitration Apr. 10, 2001), [http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf) (the third major Pope & Talbot decision, addressing national treatment and fair and equitable treatment).
over treatment of export quotas under a U.S.-Canada agreement, and resulted in a determination that the national treatment provisions of NAFTA were not violated, on the ground that different classes of lumber producers and exporters that were actually in like circumstances were not treated differently. The latter turned on Canadian government regulations which effectively precluded the export of hazardous wastes for processing in the United States so as to assure that Canadian wastes would be processed by a Canadian firm in Alberta; a violation of Article 1102 (national treatment) was found. In another case, *Feldman v. Mexico*, a tribunal decided that foreign and domestic cigarette resellers were in like circumstances, but not foreign resellers and domestic cigarette manufacturers.

Most favored nation treatment, in NAFTA and in CAFTA-DR, is designed to assure that investors of one party are not treated in a discriminatory manner with regard to investors of another treaty party or investors with rights under a separate investment treaty with the host government. The CAFTA-DR language, virtually identical to that in NAFTA, provides:

> Each Party shall accord to investors [covered investments] of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

This language has not been tested extensively under the NAFTA investment provisions, but was applied by a Chapter 20 NAFTA tribunal in *Cross Border Trucking Services*. In that case, Mexico claimed that the United States was violating NAFTA’s most favored nation investment (and services) clauses by permitting Canadian investment in U.S. trucking firms while denying Mexican investors the same opportunities. It may be that under an agreement with seven state parties instead of only three, most-favored-nation issues will arise more frequently than they have under NAFTA. This is particularly true for any CAFTA-DR Parties that have an extensive network of bilateral invest-

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105 See *Feldman v. Mexico*, 42 I.L.M. 625 (2003) (the author served as one of the members of the tribunal).

106 CAFTA-DR, supra note 3, ch. 10, art. 10.4.1.

ment treaties, because an investor can seek the applications of more favorable provisions (if any) in alternative treaties through the most favored nation clause in Chapter 10.\textsuperscript{108}

3. Minimum Standard of Treatment

Among the most complex obligations under Section A of the investment chapter is the obligation to provide a minimum standard of treatment, particularly fair and equitable treatment, to foreign investors. The concept here is again relatively simple. What if the host state treats both foreign investors and its own citizens in an arbitrary and unreasonable manner? This would not violate a national treatment standard, but it would fall afoul of a fair and equitable treatment requirement. Full protection and security, in recent U.S. treaty practice at least, refers largely to police protection in the event of mob violence and the like. CAFTA-DR provides that “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”\textsuperscript{109}

This language is substantively identical to NAFTA, except that NAFTA does not include the term “customary” before “international law.”\textsuperscript{110} However, the NAFTA Parties attempted to eliminate the confusion as to the extent to which “customary international law” meant something different (and more narrow) from “international law,” by issuing a binding “Interpretation” of NAFTA Chapter 11.\textsuperscript{111} The Interpretation stated, inter alia, that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”\textsuperscript{112} A full discussion of the proper scope of fair and equitable treatment and what constitutes the minimum standard of treatment under customary interna-

\textsuperscript{108} See CAFTA-DR, supra note 3, ch. 10, art. 10.5. There is an ongoing discussion regarding whether jurisprudence regarding most-favored nation principles governing trade (e.g., GATT, Article I) should be applicable when most-favored nation issues are raised under investment treaty provisions, as with CAFTA-DR, Article 10.5.

\textsuperscript{109} Id.

\textsuperscript{110} NAFTA, supra note 30, art. 1105(1).

\textsuperscript{111} Id. art. 1131(2) (providing that “An interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”); see CAFTA-DR, supra note 3, ch. 10 (art. 10.23.2 incorporates similar language).

tional law is well beyond the scope of this Article. However, it is noted here that the Interpretation was designed in part to counteract one of the early Pope & Talbot decisions, in which the tribunal unwisely decided that the NAFTA fair and equitable treatment was in addition to what was required under international law.

Thus, for subsequent FTAs, including CAFTA-DR, the U.S. negotiators apparently decided to make it more difficult for tribunals to make mischief with fair and equitable treatment. Accordingly, CAFTA-DR “for greater certainty” contains more specific definitions and limitations. First:

The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that [customary international law minimum] standard, and do not create additional substantive rights.

Secondly:

“[F]air and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . .

This language also reflects NAFTA experience, and a perceived need to instruct future tribunals on how to deal with situations in which the

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115 CAFTA-DR, supra note 3, ch. 10, art. 10.5.2.

116 “Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.” Harvard Research Draft, art. 9, quoted in Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 506–07 (6th ed. 2003).

117 CAFTA-DR, supra note 3, ch. 10, art. 10.5.2(a).
tribunal is effectively reviewing a national court or administrative decision for consistency with CAFTA-DR Chapter 10. Denial of justice has been addressed in at least two NAFTA decisions, *Loewen, Mondev International Ltd. v. United States*\(^{118}\) and *Waste Management v. Mexico*,\(^{119}\) although no clear standard has yet been articulated in the NAFTA jurisprudence.\(^{120}\)

Thirdly, the CAFTA-DR parties decided to define customary international law:

> The Parties confirm their shared understanding that “customary international law” generally . . . results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5 [minimum standard of treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.\(^{121}\)

These particular clarifications reflect U.S. Trade Promotion Authority language, quoted at length above, which effectively requires that standards “for fair and equitable treatment [be] consistent with United States legal principles and practice, including the principle of due process.”\(^{122}\) As one U.S. government attorney has asserted, “These clarifications do not change the nature of the substantive obligations . . . instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties’ intent in agreeing to those obligations.”\(^{123}\) They also seem designed, however, to narrow the choices for members of future tribunals, despite the fact that a tribunal, such as the one in *Loewen*, would still have to decide the requirements of a denial of justice under customary international law, and despite the fact that a tribunal, such as that in *Pope & Talbot*, would still have to decide what constitutes the minimum standard re-

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\(^{118}\) 42 I.L.M. 85 (2003).


\(^{120}\) See Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int’l L. 809, 849–860 (2005) (discussing the tribunals’ treatment of denial of justice and concluding that the “tribunals have not, however, entirely agreed on the progress made in the intervening seventy-five years [since the Mexican General Claims Commission cases], and they have not announced appreciably clearer or more useful standards.”).

\(^{121}\) CAFTA-DR, *supra* note 3, Annex 10-B.

\(^{122}\) 19 U.S.C. § 3802(b)(3)(E) (2002); *see infra* Part III.A.

\(^{123}\) Menaker, *supra* note 77, at 122.
quired under international law for fair and equitable treatment, a standard that is determined by looking at state practice. Whether it will discourage arbitrators from looking at other sources of international law\textsuperscript{124} in determining that standard, such as earlier arbitral decisions and any of the several thousand bilateral investment treaties in force (or even U.S. Supreme Court jurisprudence), remains to be seen.

4. Direct and Indirect Expropriation

Expropriation is probably the single most complex and politically sensitive area in investment treaties, as suggested in the earlier discussion of regulatory takings and the Fifth Amendment to the U.S. Constitution. For all the discussion and commotion, there has been only one tribunal decision under NAFTA that resulted in a finding of expropriation, \textit{Metalclad v. United Mexican States}.\textsuperscript{125} Despite the rather weak reasoning of the tribunal, \textit{Metalclad} involved an arguably “garden variety” expropriation. Metalclad was deprived of the use and enjoyment of its hazardous waste disposal facility by state authorities, purportedly to create an “ecological preserve.”\textsuperscript{126} Indirect or “creeping” expropriations are covered by NAFTA as well as by CAFTA-DR, yet to date none has been found; \textit{Methanex}, noted earlier, is the only decision to date where conceivably that result might have occurred.

However, notwithstanding that case history, the broad expropriation language of both agreements, by itself, would suggest that the critics are not paranoid. The basic language of CAFTA-DR is instructive:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

(a) for a public purpose;

\textsuperscript{124} See Statute of the International Court of Justice art. 38, Jun. 26, 1945, 59 Stat. 1055, 3 Bevans 1179 (establishing a hierarchy of sources of international law: international conventions; international custom; general principles of law recognized by civilized nations; judicial decisions and the teachings of publicists “as subsidiary means for the determination of rules of law.”). Some scholars, such as expert NAFTA Chapter 11 attorney Todd Weiler, argue that this additional language (whether in the NAFTA Interpretation or in CAFTA-DR) simply defines the standard as customary international law, leaving the question of the substance of the obligation as applied by tribunals in particular cases, subject to being informed by treaty, custom and/or general principles of international law. E-mail from Todd Weiler to Author (Sept. 18, 2006, 21:41:00) (on file with author).

\textsuperscript{125} Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 44 (2001).

\textsuperscript{126} Id. at 44.
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate and effective compensation in accordance with paras. 2 through 4;\textsuperscript{127} and
(d) in accordance with due process of law and Article 10.5.\textsuperscript{128}

This language differs somewhat from NAFTA, but primarily in non-substantive respects. NAFTA also covered both direct and indirect expropriation, but contained a confusing term “tantamount to expropriation” which now reads “equivalent to expropriation,” generally following the interpretation of the term endorsed by the tribunal in \textit{S.D. Myers}.\textsuperscript{129} The language does not really deal with the key problem, which is deciding what constitutes an indirect expropriation. Most actual or alleged expropriations in recent years, and certainly those in the NAFTA and Central American countries, are not situations in which the army marches into a foreign owned facility and seizes it.\textsuperscript{130} Rather, they are indirect takings, sometimes called “creeping” expropriations, where one or more government actions accidentally or intentionally make it impossible for a foreign investor to continue to operate.

Nor are the four conditions a great deal of assistance, since they kick in only after the existence of an expropriation has been found under the “chapeau.” Moreover, as long as fair compensation is required, it does not make much difference in the final analysis whether the expropriation meets the other three standards. Traditionally, a sovereign government can nationalize without second-guessing as long as it pays fair compensation, and tribunals seem loath to decide whether a particular action is for a public purpose. However, under both NAFTA and CAFTA-DR, tribunals might be more likely to order restitution of the property seized by the expropriating government in

\textsuperscript{127} Paragraphs 2–4 of Article 10.7 require payment without delay based on the fair market value of the investment, fully realizable and fully transferable in convertible currency or at a fair rate of conversion, plus interest. CAFTA-DR, supra note 3.

\textsuperscript{128} \textit{Id.} ch. 10, art. 10.7.1.


\textsuperscript{130} This has happened most recently in Bolivia, where soldiers were ordered to occupy the natural gas fields in May 2006. Notisur South American Political and Economic Affairs, \textit{Bolivia: President Evo Morales Nationalizes Natural Gas Resources}, May 12, 2006, 2006 WLNR 8238298. See generally David A. Gantz, \textit{The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property}, 71 \textit{Am. J. Int’l. L.} 474 (1977) (discussing the takeover, in 1975, by the Peruvian army of an American company’s iron ore mine and smelter, and the compensation negotiations that followed).
an “illegal” expropriation, even through the expropriating government has the option of paying monetary damages.\textsuperscript{131}

CAFTA-DR does expand, however, on the NAFTA expropriation language in several important respects, which may well make it somewhat more difficult for claimants to convince tribunals to find indirect expropriations or actions equivalent to expropriations that would otherwise require compensation:

The Parties confirm their shared understanding that:
1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it \textit{interferes with a tangible or intangible property right or property interest in an investment}.
3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the \textit{economic impact of the government action}, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the \textit{character} of the government action.

(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,
safety, and the environment, do not constitute indirect expropriations.\textsuperscript{132}

Some of these are significant changes, some not, but all affect the ticklish determination of what actions may constitute an indirect expropriation.\textsuperscript{133} Paragraph 1, relating to customary international law, reflects concepts already discussed. Paragraph 2 seeks to limit expropriations to property rights. What is \textit{not} a property right that the United States wishes to exclude from coverage? Perhaps this is intended to clarify that market access alone is not a property right, or perhaps it partially reflects Methanex, where the company was allegedly deprived of its opportunity to sell methane because its customers in California could no longer produce MTBE. Perhaps the objective is to distinguish the rights “related to” investments from cases based primarily on trading activities rather than on investment per se, as with Ethyl,\textsuperscript{134} Pope \& Talbot, S.D. Myers, and Feldman.

Paragraph 3 provides a specific, but non-controversial, definition of direct expropriation. Paragraph 4 deals with the thorny issue of defining what constitutes an indirect expropriation or taking, and reflects U.S. Supreme Court jurisprudence, specifically the \textit{Penn Central} approach.\textsuperscript{135} Paragraph 4(a) directs a case-by-case approach, focusing on a non-exclusive series of considerations, including the economic impact of the government on the investor, the investor’s reasonable expectations, and the character of the government action. (Presumably, this goes to some extent to motive, and to whether the government was seeking to force an investor out of business or has other, less suspect objectives.)

The most significant part is likely paragraph 4(b), which establishes the presumption that a group of regulatory actions designed to protect legitimate public welfare objectives (including, but not limited

\textsuperscript{132} CAFTA-DR, \textit{supra} note 3, Annex 10-C (emphasis added).

\textsuperscript{133} \textit{See} Menaker, \textit{supra} note 77, at 123 (explaining that “the annex [to post NAFTA investment provisions] sets forth a number of factors that tribunals should take into consideration when determining whether an indirect expropriation has occurred”).


to, those enumerated) will be excluded from treatment as a compensable indirect expropriation. However, the language, again reflecting *Penn Central*, does not require the “appropriation” of the property, only that the effect of the government action constitutes an expropriation. What impact this will have is difficult to assess unless and until there are tribunal actions under CAFTA-DR, the Chile and Singapore FTAs, or others agreements with this language. Some, including this author, have expressed the concern that excluding a broad class of regulatory actions from treatment as an expropriation would be an invitation to clever, perhaps unscrupulous, government officials to craft a regulation that is non-discriminatory on its face, but is nevertheless designed or applied in such a manner as to put a certain foreign company or group of companies out of business. At a minimum, such a definition raises the burden of proof for foreign claimants arguing that regulatory actions were in fact expropriatory.\(^\text{136}\) Perhaps the “except in rare circumstances” language will give the tribunals a reasonable opportunity to treat government actions otherwise fitting the exception as expropriatory nevertheless, as the U.S. Supreme Court did in *Lucas*.\(^\text{137}\)

5. Performance Requirements

The performance requirements section of CAFTA-DR gives foreign investors somewhat greater specificity than the WTO’s Agreement on Trade-Related Investment Measures (TRIMs),\(^\text{138}\) by providing a more expansive list of what constitutes banned performance requirements. Additionally, it includes a series of exceptions, for example, for compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and for the General Agreement on Tariffs and Trade (GATT) Article XX exceptions for “compliance with laws and regulations that are not inconsistent with this Agreement,” and for measures (including environmental measures) “necessary to protect human, animal or plant life or health” or “related to the conservation

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\(^{137}\) See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–32 (1992) (majority of the Court determined that a state regulation of beachfront property, depriving the claimant of essentially all productive use of his property, constituted a compensable taking).

of living or non-living exhaustible natural resources.” Also, unlike TRIMs, Chapter 10 effectively provides a private right of (investor) action. Performance requirements have not been a major issue in NAFTA litigation. Although a claim was made in both Pope & Talbot and S.D. Myers, the tribunal rejected it in both instances. Article 10.9 bars the usual tie-ins—exporting a given level of goods or services produced, maintaining a given level of domestic content, relating import volume or value to exports or to the availability of foreign exchange, limiting sales based on export volume, technology transfer requirements, and exclusive supply arrangements. None of these requirements may be imposed, “in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory . . . .”

Similarly, the receipt of government benefits or advantages may not be conditioned on achieving domestic content, local purchase, or export requirements. There are exceptions for intellectual property rights when the Party is in compliance with the WTO TRIPs Agreement; enforcing its anti-competition laws; if non-discriminatory measures are imposed which are necessary to secure compliance with laws and regulations otherwise consistent with the Agreement; or to protect human, animal or plant life and health or related to conservation of living or non-living exhaustible natural resources. These later two provisions, including the “necessary” terminology, closely track GATT 1994, Article XX, and may well be implemented in a similarly narrow manner, including the limitation of “necessary” to permit certain measures where no less trade restrictive measure is available.

139 CAFTA-DR, supra note 3, ch. 10, art. 10.9; see General Agreement on Tariffs and Trade art. 20(b), (d), (g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc (last visited May 5, 2007) [hereinafter GATT]; TRIMS, supra note 137, art. 3 (the latter incorporating all GATT exceptions into TRIMS).
141 Id. ch. 10, art. 10.9.1.
142 Id. ch. 10, art. 10.9.2.
143 Id. ch. 10, art. 10.9.3(b)-(c).
Of course, one should not assume that NAFTA arbitrators will necessarily follow the GATT jurisprudence in interpreting these CAFTA-DR provisions.

6. Investment, Labor, and the Environment

CAFTA-DR contains an environmentally friendly sounding exception, investment and the environment:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.\(^\text{145}\)

In the NAFTA context identical language\(^\text{146}\) has had essentially no significance; it was mentioned, but dismissed in \textit{S.D. Myers}.\(^\text{147}\) The provision was circular: the environment could be protected, but enforcement had to be “otherwise consistent with this agreement.” However, as noted earlier, in NAFTA there is no presumption against treating environmental regulatory actions as indirect expropriation. Arguably, the same language in CAFTA-DR could have a more substantive impact, as it may be cited to reinforce the presumption in Annex 10-C(4)(b) that environmental regulation is not normally to be considered to be a compensable taking.

NAFTA reflected concerns on the part of some in the United States that lax labor or environmental regulation would be used as a means of attracting investment to Mexico, and they have attempted to discourage this by stating that:

The Parties recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the

\(^{145}\) CAFTA-DR, \textit{supra} note 3, ch. 10, art. 10.11.

\(^{146}\) See NAFTA, \textit{supra} note 30, art. 1114(a).

\(^{147}\) See S.D. Myers, Inc. v. Government of Canada, 40 I.L.M. 1408, 1461–62 (2001) (separate opinion of Dr. Brian Schwartz) (characterizing Article 1114 of NAFTA “as acknowledging and reminding interpreters of chapter 11 (investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives . . . .”).
establishment acquisition, expansion or retention in its territory of an investment of an investor.\textsuperscript{148}

NAFTA also provided for consultations in the event of possible violations. Even if this language were somehow relating to the later-drafted North American Agreement on Labor Cooperation,\textsuperscript{149} CAFTA-DR contains the identical first sentence in both the labor and the environmental chapters, but is somewhat weaker on the follow-up, whereby the Party is to “strive to ensure that it does not waive or otherwise derogate from . . . .”\textsuperscript{150} CAFTA-DR also lacks the explicit right of consultation.


Other provisions in section A cover such matters as investor interests in the case of armed conflict and civil strife,\textsuperscript{151} a provision that does not appear in NAFTA although perhaps it could be incorporated on the basis of NAFTA’s most favored nation clause applicable to state obligations to foreign investors, Article 1103. In CAFTA-DR, the Parties are to “accord to investors of another Party, and to covered investments, non-discriminatory treatment with regard to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife;” if the investor’s property is requisitioned or destroyed by government forces to an extent not required by the “necessity of the situation,” compensation is required.\textsuperscript{152} Guatemala has taken a reservation to the latter.\textsuperscript{153}

Funds transfers, performance requirements, and choice of senior management, among others, are also covered and are all adapted with minor modifications from the parallel NAFTA provisions. The transfer provisions of CAFTA-DR cover the range of possible income sources, including capital contributions, profits, dividends, capital gains, interest, royalty payments, and those payments arising out of a dispute.\textsuperscript{154} The transfers must be available freely and without delay, in a freely usable currency, and include returns in kind when covered by an agreement.\textsuperscript{155} Exceptions are preserved for bankruptcy, insolvency, securities

\textsuperscript{148} NAFTA, \textit{supra} note 30, art. 1114.2.


\textsuperscript{150} CAFTA-DR, \textit{supra} note 3, ch. 10, arts. 16.2.2, 17.2.2 (emphasis added).

\textsuperscript{151} \textit{Id.} ch. 10, art. 10.6.

\textsuperscript{152} \textit{Id.} ch. 10, arts. 10.6.1–2.

\textsuperscript{153} \textit{Id.} ch. 10, Annex 10-D.

\textsuperscript{154} \textit{Id.} ch. 10, art. 10.8.1.

\textsuperscript{155} CAFTA-DR, \textit{supra} note 3, arts. 10.8.1–3.
deals, criminal offenses, financial reporting, records needed for law enforcement, and compliance with judgments.\textsuperscript{156}

In CAFTA-DR, like NAFTA, investors retain the discretion to choose senior management and boards of directors without regard to nationality, but investors must follow normal national requirements that a majority of the board of directors be of the host country’s nationality, unless that requirement were to “materially impair the ability of the investor to exercise control over its investment.”\textsuperscript{157}

8. Exceptions and Reservations for Non-Conforming Measures

Finally, there is an exception in Chapter 10 for non-conforming measures. These provisions preserve the Parties’ rights to protect existing non-conforming measures at the central government, regional or local government level when those measures are set out in a Party’s Annex I (existing non-conforming measures that are preserved).\textsuperscript{158}

However, they apply only to certain Section A benefits, national treatment, most favored nation treatment, performance requirements and senior management. They do not free annex or non-conforming measures from the obligations relating to the minimum standard of treatment or expropriation, among others. The section also bars new laws covered by the Party’s Annex II (permitting existing and new non-conforming restrictions), from forcing an investor to dispose of his investment based on the investor’s nationality.\textsuperscript{159}

The reservations in Annexes I and II of CAFTA-DR are set out on a country-by-country basis, and in many instances are extensive. For example, in Costa Rica’s Annex I, under “Cross Border Services and Investment” the following reservation appears:

A concession is required to perform any type of development or activity in the maritime-terrestrial zone [200-meter strip along the entire coastline]. Such a concession shall not be granted to or held by: (a) foreign nationals that have not resided in the country for at least five years; (b) enterprises with bearer shares; (c) enterprises domiciled abroad; (d) enterprises incorporated in the country solely by foreign nationals; or (e) enterprises where more than fifty percent of the capital shares or stocks are owned by foreigners.

\textsuperscript{156} Id. ch. 10, art. 10.8.4.  
\textsuperscript{157} Id. ch. 10, art. 10.10.  
\textsuperscript{158} Id. ch. 10, art. 10.13.1.  
\textsuperscript{159} Id. ch. 10, art. 10.13.2.
Within the maritime-terrestrial zone, no concession may be granted within the first 50 meters counted from the high tide line nor in the area comprised between the high tide line and the low tide line.\footnote{CAFTA-DR, \textit{supra} note 3, Annex I (Costa Rica), I-CR-9.}

As is obvious, in the absence of its status as a reserved non-conforming measure, this proviso discriminates against foreigners in conflict with Article 10.3 regarding national treatment and might be subject to challenge as well under Article 10.5 (minimum standard of treatment). (Even so, Annex I does not override the “fair and equitable treatment” rights of investors.) Costa Rica is not alone. In Annex I, U.S. reservations cover, inter alia, atomic energy, mining, air transportation, and radio communications. These restrictions are not necessarily outright bans on foreign investment, but they typically restrict foreign investment in the enumerated sectors.\footnote{Id. Annex I (United States), \textit{passim}.}

\section*{III. Investor-State Dispute Settlement}

In addition to a series of investor rights, CAFTA-DR, like all U.S. BITs and most U.S. FTAs,\footnote{Except, as noted earlier, the Australia and Jordan FTAs.} contains provisions for mandatory international arbitration of investor-state disputes. Substantively, there are relatively few major differences between the mechanisms set forth in CAFTA-DR and those in NAFTA. Certain procedural modifications have been made, and provisions relating to transparency of the arbitral proceedings based on several NAFTA Commission decisions have been incorporated into the text of CAFTA-DR. Both agreements follow now-traditional procedures first developed in international commercial arbitration with regard to such matters as consultations, choice of arbitrators, procedural due process, and the like. Despite certain CAFTA-DR specific requirements, however, most of the procedural aspects of investor-state arbitration are governed by the arbitration rules chosen by the disputing parties, either those of ICSID\footnote{See ICSID, \textit{Rules of Procedure for Arbitration Proceedings}, \textit{supra} note 79.} or of the United Nations Commission on International Trade Law.\footnote{UNCITRAL Arbitration Rules (1976), GA Res. 31/98, \textit{available at} http://www.unctad.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (last visited May 5, 2007). CAFTA-DR, \textit{supra} note 3, ch. 10, art. 10.16.5 (“[t]he arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration...”)}
If non-binding consultations and negotiations\textsuperscript{165} are unsuccessful in resolving the dispute, the claimant, either on her own behalf or on behalf of an enterprise (a legal entity) controlled by the claimant, may lodge a claim that the responding Party has breached one of its obligations under Section A.\textsuperscript{166} However, in a significant addition to the coverage provided in NAFTA, Chapter 11, claims may also be brought for breach of an “investment authorization” or “investment agreement.”\textsuperscript{167} CAFTA-DR defines an “investment authorization” as “an authorization that the foreign investment authority of a Party grants to a covered investment of an investor of another party . . . .”\textsuperscript{168} (The United States has no such authority as the term is used here, so this protection is meaningless for foreign investment into the United States.)

“Investment agreement” is defined as a:

[W]ritten agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself. . . .\textsuperscript{169}

The right of an investor to challenge not only a violation of international law as embodied in the protections of Section A, but also a breach of an investment authorization or agreement, could significantly increase the potential scope of jurisdiction of investor-state dispute settlement, particularly in countries where the requirement of formal government approval of certain investments is a common practice. Reliance on government approvals also becomes an explicit factor in determining jurisdiction over a state. Without this language, a breach of an investment authorization or agreement could not be challenged unless it also constituted a breach of a Section A obligation.

\textsuperscript{165} \textit{Id.} ch. 10, art. 10.15.
\textsuperscript{166} \textit{Id.} ch. 10, art. 10.16(1).
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.} ch. 10, art. 10.28.
\textsuperscript{169} CAFTA-DR, \textit{supra} note 3, ch. 10, art. 10.28 (“national authority” means the authority of the central government only, not that of any state or local entity, per Article 10.28, footnote 13).
The Advisory Committee for Trade Policy and Negotiations, reviewing CAFTA-DR, was particularly impressed by these additions: “The Committee stresses the importance of covering both investment authorizations and agreements, and cannot urge strongly enough that these provisions must be part of all future agreements.”

A. Notice, Choice of Forum, and Consent

CAFTA-DR contains several notice requirements. First, at least ninety days before a claim can be submitted to arbitration, a “notice of intention to submit a claim to arbitration” must be filed with the respondent state. The claimant is required to specify, in addition to names and addresses, the particular provisions of Section A or of the investment authorization or investment agreement for which a breach is claimed, the “legal and factual basis for each claim,” as well as the relief sought and the approximate damages claimed. This requires something more than simple “notice” pleading, given the language about the legal and factual basis for each claim. With the similarity of this language to NAFTA, claimants under CAFTA-DR can draw on the NAFTA practice, in which the notice of intent is typically ten to fifteen pages, and it is probably reasonable to assume that the CAFTA-DR Free Trade Commission will eventually issue guidelines for such notices, as has occurred in NAFTA. While this NAFTA document is effectively a recommendation and thus not binding on claimants, it does state that if the form is properly completed it “will satisfy the requirement of Article 1119.”

171 CAFTA-DR, supra note 3, ch. 10, art. 10.16.2.
172 See NAFTA, supra note 30, art. 1119.
174 Cabinet level representatives of the Parties, as established under Article 19.1. See CAFTA-DR, supra note 3, ch. 19, art. 19.1.
176 Id.
The more important notice is, of course, the notice of arbitration, which cannot be filed until “six months have elapsed since the events giving rise to the claim . . . .”177 This six-month period is presumably designed to allow the claimant and the government an opportunity for settlement negotiations. If the claimant meets the six months requirement, and ninety days has elapsed since the communication of the notice of intent, as noted above, the claimant may submit her claim, designating one of the three rule/forum options provided under the Agreement, the ICSID Convention and the ICSID Arbitration Rules, the ICSID Additional Facility Rules,178 or the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules.179 (UNCITRAL, unlike ICSID, provides no secretariat, so parties seeking arbitration under the UNCITRAL Rules must arrange for secretariat services at either ICSID, another existing arbitration secretariat, or make ad hoc arrangements.)

For most disputes under CAFTA-DR, there will not really be three alternatives, but only two—the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules, since all the CAFTA-DR Parties other than the Dominican Republic are also Parties to the ICSID Convention.180 (For the Dominican Republic alone, the alternatives would be the ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules.) The ICSID Secretariat is authorized to administer conciliation and arbitration proceedings under the ICSID Additional Facility rules “for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State” or proceedings “which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State . . . .”181 For the six CAFTA-DR Parties that are also parties to

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177 CAFTA-DR, supra note 3, ch. 10, art. 10.16.3.
178 See ICSID, Rules of Procedure for Arbitration Proceedings, supra note 79. For arbitration under ICSID, the arbitration is governed by relevant provisions of both the ICSID Convention and the ICSID Arbitration Rules. Where the ICSID Additional Facility Rules are used, as either the host state or the investor’s home state is not a party to ICSID, only the Additional Facility Rules themselves govern the arbitration. See id.
179 CAFTA-DR, supra note 3, ch. 10, art. 10.16.3.
180 Of course, the investor and state can always agree on a different mechanism. (The Dominican Republic signed the ICSID Convention in March 2000, but has not ratified it.)
181 ICSID Additional Facility Rules, supra note 80, art. 2.
the ICSID Convention, the ICSID Secretary General would not be authorized to administer a dispute involving a CAFTA-DR investor and a state under the Additional Facility, unless the Secretary General were to determine that it did not arise directly out of an investment. The “investment” requirement is embodied in the ICSID Convention itself, but is not defined there. It is in theory conceivable—although very unlikely—that a claim based on provisions of an investment authorization or investment agreement under CAFTA-DR, or a claim considered an investment under NAFTA, might not be considered a dispute arising “directly out of an investment” and thus be shifted from the ICSID Arbitration Rules to the ICSID Additional Facility Rules.

Notice is considered delivered when received by the ICSID Secretary General (for arbitrations under either of the ICSID rules) or by the respondent (for arbitration under UNCITRAL). Under the ICSID Convention, the Secretary General acts as registrar, and at least in theory may refuse to register a claim if, for example, in his view it does not “arise directly out of an investment” or does not otherwise meet the rules of the Convention. In contrast, if a claim is filed under the UNCITRAL Rules with the respondent state, the arbitral tribunal will presumably decide any jurisdictional issues, although there is a risk that the respondent state will refuse to cooperate. At the time the notice is submitted, the claimant is to provide the name of the arbitrator she wishes to appoint or consent in writing to appointment by the ICSID Secretary General as appointing authority.

To avoid confusion, particularly when the notices are to be filed under UNCITRAL with the respondent state rather than the ICSID Secretary General, CAFTA-DR provides specific addresses for claimant delivery of notices and other documents. This should make it more

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182 See ICSID Convention, supra note 78.
183 Id. art. 25 (provides in pertinent part that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [or any constituent subdivision or agency of a Contracting State designated to the Centre by that State] and a national of another Contracting State”).
184 Id. arts. 11, 25. According to one authority, Todd Weiler, the ICSID Secretariat refused to register the “Baha Beach” claim against Mexico because the investors could not provide proof of authorization by each named claimant to proceed. E-mail from Todd Weiler to Author (Feb. 26, 2007, 17:21:00) (on file with author); see also Notice of Intent to Supply a Claim, Billy Joe Adams et al., Nov. 10, 2000, available at http://naftaclaims.com/Disputes/Mexico/Adams/AdamsNoticeOfIntent.pdf (last visited May 5, 2007) (listing more than 100 potential claimants a taking of their property in Baha, California).
185 CAFTA-DR, supra note 3, ch. 10, art. 10.16.6.
186 Id., ch. 10, art. 10.27, Annex 10-G.
difficult for respondents to argue that they have not received timely notices and other served documents.

CAFTA-DR, like virtually all U.S. FTA investment chapters and BITs, constitutes the necessary written consent by the governments to the jurisdiction of ICSID, “an agreement in writing” under the New York Convention and an “agreement” the Inter-American Convention. Thus, a CAFTA-DR Party cannot refuse to arbitrate because it did not consent to the arbitration.

For the claimant, of course, there has been no prior consent to arbitration (unless it was contained in an investment agreement), and in CAFTA-DR, as in NAFTA, a prospective claimant must meet a number of procedural requirements in order for arbitration under Chapter 10 to proceed. First, there is a statute of limitations. “No claim may be submitted to arbitration under this Section of more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged” and that either the claimant or enterprise “has incurred loss or damage.” For a case that is based on an ongoing series of actions or measures that allegedly conflict with state obligations under Section A, this may mean that any recovery will be limited to damages for no more than the most recent three years after the claim is filed (unless of course the claimant only recently discovered a course of action by the government that was ongoing for many years). This three-year window for seeking arbitration may be significantly narrowed if the claimant, once becoming aware of the potential breach, fails to pursue any advisable consultations on negotiations, and submission of the notice of intent, promptly.

Secondly, the claimant must formally consent to the arbitration. Third, CAFTA-DR contains what amounts to a “no u-turn” provision for

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187 Id. ch. 10, art. 10.17.
190 CAFTA-DR, supra note 3, ch. 10, art. 10.18.1.
191 In Feldman, the claimant had alleged a continuing course of conduct going back not only more than three years, but for several years before NAFTA entered into force, and had not filed his NAFTA claim at the earliest possible time. Under these circumstances, although a majority of the tribunal found a violation of NAFTA’s national treatment provisions, damages were limited to the three year period. 42 I.L.M. 625, 634–35 (2003).
192 CAFTA-DR, supra note 3, ch. 10, art. 10.18.2(a).
investors of most Parties but a “fork in the road” provision for U.S. investors in the other Parties. The claimant or enterprise is required, as a condition of arbitration, to waive the right to initiate or continue administrative tribunal or court proceedings under the law of any party (presumably local law in virtually all cases), except for interim injunctive relief not seeking monetary damages. (For U.S. investors, once an action challenging a Party action as a violation of Section A is lodged in a local court or tribunal, arbitration under Section B is precluded.) Provisions of this type are related to the fact that under CAFTA-DR, as with most such investment protection agreements, the traditional customary requirement that a claimant exhaust local and administrative remedies before bringing an international claim does not exist. Similar language is found in NAFTA.

The CAFTA-DR provisions do not on their face appear to require a choice between international arbitration or local court action at the outset. Rather once arbitration is initiated, the local option is no longer available, so existing actions must be terminated and new ones cannot be initiated. However, this choice may be more apparent than real for U.S. investors, as an annex essentially provides that when a U.S. investor files a claim against one of the Central American Parties or the Dominican Republic, the election is definitive—should a breach of Section A be lodged first in a local court or administrative tribunal, “the investor may not thereafter submit the claim to arbitration under Section B.” (The investor may protect herself in the local court action if the investor only alleges violations of local law.)

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194 CAFTA-DR, *supra* note 3, ch. 10, arts. 10.18.2(b)-3.
195 Id. Annex 10-E.
196 See Brownlie, *supra* note 116, at 472–74; ICSID Convention, *supra* note 78, art. 26 (a Contracting State may require the exhaustion of local remedies as a condition to its acceptance of ICSID jurisdiction).
197 See Loewen Group Inc. v. United States (Award), 42 I.L.M. 811, 811 (2003). Under NAFTA jurisprudence if the claimant is effectively challenging the validity of a national court decision the bar is higher; she must essentially demonstrate a denial of justice under international law, not simply that the result might otherwise have been a denial of fair and equitable treatment under Article 1105. See id.; see also Azinian v. United Mexican States, 39 I.L.M. 537, 555 (2000); Loewen, Mondev Int’l Ltd. v. United States, 42 I.L.M. 85, 109–10 (2003).
198 See NAFTA, *supra* note 30, art. 1121.2(b).
199 CAFTA-DR, *supra* note 3, ch. 10, art. 18.2(b).
200 Id. Annex 10-E.
The rule for investment authorizations or investment agreements challenges (rather than Section A challenges) is even more explicit that once a choice is made, it is irrevocable. If a potential CAFTA-DR Chapter 10 claimant “has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution” the claimant is barred from the Chapter 10 remedy.\textsuperscript{201} Whether tribunals will actually refuse to hear such claims remains to be seen. Jurisprudence under various BITs suggests that claims may be allowed to proceed if there is no identity of parties and issues, or if the local claim was premised on local law alone, with the international claim being premised on international law as reflected in the BIT or FTA investment provisions\textsuperscript{202} (or, by analogy, on the Section A language of CAFTA-DR).

B. The Arbitral Process

Under CAFTA-DR, as under NAFTA and most other similar investment agreements, there are normally three arbitrators, two appointed by the parties, and the third appointed by agreement of the parties. If the parties do not agree within seventy-five days after submission of the claim—a frequent occurrence—the third arbitrator is appointed by the ICSID Secretary General (even if the arbitration is taking place under the UNCITRAL rules).\textsuperscript{203} The respondent state is deemed to have agreed (with prejudice to objection on grounds other than nationality), and the claimant must agree in writing, to appointment of the three arbitrators, for purposes of the ICSID Convention and the ICSID Additional Facility rules.\textsuperscript{204} In general, the conduct of the arbitration is consistent with the rules applicable under the relevant arbitral rules and NAFTA, with one significant exception. As is usual, the tribunal determines the “place” of arbitration after consultation with the parties.\textsuperscript{205} (This is important,\textsuperscript{201} Id. ch. 10, art. 10.18.4.
\textsuperscript{203} CAFTA-DR, supra note 3, ch. 10, arts. 10.19.1–3.
\textsuperscript{204} Id. ch. 10, art. 10.19.4.
\textsuperscript{205} Id. ch. 10, art. 10.20.1.
because in the case of ICSID Additional Facility or UNCITRAL arbitration, it determines which national courts would have jurisdiction over any challenges to the award. For ICSID arbitrations, the only challenge is in theory to an ICSID Annulment Committee, but when a judgment is entered in a national court, some additional challenges may nevertheless be possible.) The tribunal may order “[i]nterim measures of protection,” essentially to preserve the status quo pending adjudication of the claim. Respondents are also barred from asserting as a defense that all or part of a claim is covered by insurance, presumably in order to protect the interests of the Overseas Private Investment Corporation, or any similar agency that issues political risk and other forms of insurance in any of the CAFTA-DR countries.

There are some innovations. As in NAFTA, a “non-disputing Party” may present its views either orally or in writing to the tribunal “regarding the interpretation of this Agreement.” This has happened occasionally in NAFTA, and may be more frequent in CAFTA-DR, because in each dispute there are likely to be six, rather than only two, non-disputing Parties (which include the investor’s government). Most significantly, and unlike NAFTA, CAFTA-DR states:

Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 [awards] . . . .

When a jurisdictional objection is submitted by the respondent state in accordance with the requirements of this section (within forty-five days after the constitution of the tribunal), the tribunal “shall decide on an expedited basis,” suspending proceedings on the merits,

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206 ICSID Convention, supra note 78, art. 52.
207 CAFTA-DR, supra note 3, ch. 10, art. 10.20.8.
208 Id. art. 10.20.7.
210 CAFTA-DR, supra note 3, ch. 10, art. 10.20.2.
212 CAFTA-DR, supra note 3, ch. 10, art. 10.20.4.
and “issue a decision or award on the objection(s) within 150 days” subject to extension under certain circumstances. The tribunal may award costs and attorneys’ fees in such proceedings in circumstances in which tribunal considers the claim or the respondent’s objection “frivolous,” and by implication in other situations as well. This provision is presumably designed to discourage “frivolous” actions by private claimants, and to assure (or at least to strongly encourage) tribunals to decide what are effectively motions to dismiss or motions for summary judgment in U.S. parlance as preliminary matters, rather than to combine them with decisions on the merits. Separately, CAFTA-DR explicitly authorizes a tribunal under CAFTA-DR to “award costs and attorneys’ fees in accordance with this Section and the applicable arbitration rules.” Recent NAFTA tribunals have not been reluctant to award costs and attorneys’ fees largely or entirely to the prevailing party when the tribunal felt it was appropriate, and the inclusion of the “frivolous” language may encourage CAFTA-DR tribunals to do the same.

This language likely results from U.S. frustration with several NAFTA Chapter 11 proceedings in which dismissal on jurisdictional grounds required several years of proceedings, or was combined

\[213\] Id. ch. 10, art. 10.20.5.

\[214\] Id. ch. 10, art. 10.20.6; see Menaker, supra note 77, at 127–28 (explaining the award of costs provision).

\[215\] CAFTA-DR, supra note 3, ch. 10, art. 10.26.1.

\[216\] In Methanex II and International Thunderbird Gaming Corp., the arbitral tribunals broke with what had been standard procedure of dividing the arbitral costs evenly between the parties, with each bearing its own legal fees, and taxed the losing party—the private claimant in both instances— with all or most of the arbitral costs and the other (government) party’s legal fees. Methanex v. United States (Methanex II), Final Award on Jurisdiction and Merits, 2005, at 300-01 (2005), http://www.naftaclaims.com (follow “Disputes” hyperlink; then follow “USA” hyperlink; then follow “Methanex” hyperlink); Int’l Thunderbird Gaming Corp. v. United Mexican States, Jan. 26, 2006, ¶ 222, http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Award.pdf (last visited Feb. 13, 2007) (requiring Thunderbird to pay three-quarters of the arbitration costs and most of Mexico’s outside legal fees). This “loser pays” practice, although common in international arbitration generally, and specifically contemplated in Article 40 of the UNCITRAL Rules (which governed both proceedings), obviously could have a chilling effect on the willingness of claimants lacking deep pockets, and their attorneys, to lodge new claims under NAFTA and similar investment provisions.

\[217\] See generally, e.g., Methanex v. United States (Methanex I), Preliminary Award on Jurisdiction, 42 I.L.M. 514 (2002). The Notice of Arbitration was submitted Dec. 2, 1999, and the Preliminary Award on Jurisdiction was issued on Aug. 7, 2002, about two and a half years later (the chronology of the case is available at http://www.naftaclaims.com/disputes_us_6.htm (last visited Feb. 13, 2007)); Waste Management v. Mexico, 40 I.L.M. 57, 57 (2001) (in which the elapsed time between the Notice of Arbitration (Sept. 29, 1998) and dismissal on jurisdiction (June 2, 2000) was twenty-one months). The chronology is
with a decision on the merits.\footnote{In \textit{Loewen Group v. United States}, the tribunal did issue an Award on Jurisdiction on Jan. 5, 2001, some 27 months after the Notice of Arbitration (Oct. 3, 1998). 42 I.L.M. 811 (2003). However, in that award, the tribunal effectively dismissed the United States’ jurisdiction objections on a preliminary basis and joined them to the merits, and did not ultimately decide the case until June 26, 2003 (and then on a different jurisdictional basis). \textit{Id.} at 850. In \textit{Feldman}, some of the jurisdictional issues were decided in a preliminary decision, while others were joined to the merits. 42 I.L.M. 625, 633–37 (2003).} While the problem, if any, seems mostly a question of tribunals finding it difficult to decide jurisdictional issues promptly, rather than refusing to sever jurisdictional issues from the merits, there will likely be times when the two are sufficiently entwined as to make it impractical to consider them separately. This is probably most likely to occur, where, for example, evidence to be developed in the course of the proceeding will be relevant to jurisdictional questions as well as substantive ones. In any event, CAFTA-DR claimants are on notice to be prepared for jurisdictional objections at the outset.

Several other provisions relating to the conduct of the arbitration are worth noting. As in NAFTA,\footnote{See NAFTA, \textit{supra} note 30, art. 1133.} a CAFTA-DR tribunal may, at the request of a disputing party or, in the absence of their objection, on its own initiative, appoint “one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party . . . .”\footnote{CAFTA-DR, \textit{supra} note 3, ch. 10, art. 10.24.} This is without prejudice to the possibility of appointing other kinds of experts if permitted by the applicable arbitration rules\footnote{\textit{Id.}} (which normally is not the case without the permission of the parties). Given that the arbitrators are in most cases likely to be experts in investment law, the possible need for bringing in expertise in these other areas is obvious.

There is also provision for consolidating two or more claims that have “a question of law or fact in common and arise out of the same events or circumstances,” at the request of a disputing party and with the agreement of the disputing party, subject to certain procedural requirements concerning the request and the appointment of arbitrators in consolidated cases.\footnote{\textit{Id.} ch. 10, art. 10.25.} Consolidation has been accepted only once to date under NAFTA, at the initiative of the respondent United States, with regard to three claims alleging violations of Section A aris-
ing out of the antidumping and countervailing duty orders imposed by U.S. authorities on softwood lumber imports from Canada.\textsuperscript{223}

C. Transparency

Transparency of the proceedings was an area that was addressed with regard to NAFTA only after the fact, but was addressed directly in the text with CAFTA-DR. All of the major documents (notice of intent, notice of arbitration, pleadings, memorials and briefs, submissions relating to protected information, minutes or transcripts of the hearings, orders, awards, and decisions) must be made public “promptly.”\textsuperscript{224} Hearings are to be open to the public.\textsuperscript{225} In all instances, there is an exception for protected information and procedures for protecting such information against unauthorized disclosure,\textsuperscript{226} with the further exception that a respondent may nevertheless disclose otherwise protected information when required by law.\textsuperscript{227} CAFTA-DR also authorizes the tribunal to “accept and consider amicus curiae submissions from a person or entity that is not a disputing party.”\textsuperscript{228}

This explicit language reflects concerns raised by NGOs and some U.S. government officials regarding the lack of transparency and of NGO access to the NAFTA Chapter 11 process, which some think has contributed to skepticism of the process within the United States. For example, under the ICSID Additional Facility Rules, a popular mechanism under Chapter 11, the process was not transparent, as neither the written nor the oral proceedings were open to the public.\textsuperscript{229} However, the degree of transparency of the process was increased significantly beginning in July 2001, when the governments stated that “nothing in NAFTA imposes a general duty of confidentiality” and agreed that they would “make available to the public in a timely manner all documents submitted to, or issued by, Chapter 11 tribunals” subject to certain ex-

\begin{itemize}
  \item CAFTA-DR, supra note 3, ch. 10, art. 10.21.1.
  \item Id. ch. 10, art. 10.21.2.
  \item Id. ch. 10, arts. 10.21.2–4.
  \item Id. ch. 10, art. 10.21.5.
  \item Id. ch. 10, art. 10.20.3.
  \item See ICSID Additional Facility Rules, supra note 80, art. 39 (giving the tribunal authority to decide, with the Parties’ consent, what persons may be admitted to the hearing; publication of the minutes of the hearing requires the Parties’ consent under Article 44).
\end{itemize}
ceptions for confidential or privileged information. In October 2003, Canada and the United States, but not Mexico, issued statements indicating that they would consent—and request disputing investors and tribunals to consent—to holding hearings that are open to the public, subject to measures to protect confidential business information. At the same time, a statement was issued setting forth procedures for non-disputing party (amicus curiae) participation in Chapter 11 proceedings. The language in these NAFTA Commission statements was the model for the CAFTA-DR provisions on transparency.

**D. Applicable Law**

As noted in the discussions of Section A, the scope of “international law” and “customary international law” has been an issue under the NAFTA case law, NAFTA Commission interpretations, and, ultimately, in the drafting of CAFTA-DR. As in NAFTA, CAFTA-DR tribunals are directed to decide cases under Section A “in accordance with this Agreement and applicable rules of international law.” In a number of NAFTA cases, among others, the references to “international law” relate not only to substantive international law provisions on investment, when not specified in NAFTA, but also to procedural law, particularly to the rules of interpretation set out in the Vienna Convention on the Law of Treaties.

With regard to cases arising under investment authorizations or investment agreements, the tribunal is to apply the rules of law specified in the relevant agreements, agreed upon by the parties, or, in the

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230 NAFTA Notes of Interpretation, supra note 111, pts. A(1), A(2).
233 CAFTA-DR, supra note 3, ch. 10, art. 10.22.1.
event of no such specification or agreement, the law of the respondent state (including its conflicts of laws rules) and “such rules of international law as may be applicable.”

As in NAFTA, the Commission has the power to issue an interpretation of the provisions of the investment chapter, which “shall be binding on the tribunal . . . .” Unlike NAFTA, however, CAFTA-DR adds “and any decision or award issued by the tribunal must be consistent with that decision.” This addition is presumably designed to deal with tribunals such as the one in Pope & Talbot, which, having received a Commission Interpretation, nevertheless considered carefully whether it would follow the Interpretation or ignore it, ultimately rather Huffily agreeing that it was binding. CAFTA-DR (like NAFTA) provides a mechanism whereby a respondent state, when arguing that an alleged breach is within one of the exceptions in Annexes I or II, may request the Commission to interpret the annex at issue. The Commission is to issue a decision on the request within sixty days of the request. If the Commission fails to issue the decision within that period, the tribunal may proceed to decide the issue without the Commission’s input.

Whether the issuance of formal Commission “interpretations” (or decisions under Annexes I or II) will turn out to be more common under CAFTA-DR than the issuance of interpretations under NAFTA—once in thirteen years—remains to be seen. One might speculate that the difficulties of getting three sovereign governments to agree (1) that the issuance of an interpretation was warranted; and (2) how that interpretation should be worded, would be even more complicated under an agreement with seven members of the Free Trade Commission. Annex I and II decisions, at least, are subject to a specific deadline, although it is problematic whether agreement can be reached when dealing with complex and controversial issues. (Needless to say, Commission interpretations will be easier to bring about than any formal amending of the Agreement.)

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235 CAFTA-DR, supra note 3, ch. 10, art. 10.22.2.
236 Established under CAFTA-DR, ch. 19, § A, as the trade ministers of the seven Parties or their designates.
237 CAFTA-DR, supra note 3, ch. 10, art. 10.22.3; NAFTA, supra note 30, art. 1131.2.
238 Id. ch. 10, art. 10.22.3.
239 Pope & Talbot Inc. v. Canada, Award in Respect of Damages (NAFTA Arbitration May 31, 2002), 41 I.L.M. 1347, ¶ ¶ 23–79, 80.
240 CAFTA-DR, supra note 3, ch. 10, art. 10.23; NAFTA, supra note 30, art. 1132.1.
241 CAFTA-DR permits the Commission to “establish its own rules and procedures.” However, Commission decisions are to be “taken by consensus unless the Commission otherwise decides.” CAFTA-DR, supra note 3, ch. 19, art. 19.1.5.
E. Awards and Challenges

The basic awards language in CAFTA-DR is little changed from NAFTA,242 except that in the former, awards, finality, and enforcement are addressed in a single article instead of in several articles. Awards are limited to monetary damages, or to giving the respondent state the option of providing restitution of property or monetary damages plus interest.243 If an enterprise has brought the claim, the award of monetary damages and interest or restitution shall be provided to the enterprise. Issues regarding who may have a right to the “relief” are decided under domestic law.244 No punitive damages may be awarded.245

There is, however, one major innovation, an interim review procedure. CAFTA-DR provides that:

In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.246

This procedure is apparently designed to permit the parties (most likely the respondent state) to comment on the award before it becomes final, similar to the review process afforded WTO Members involved in panel proceedings before the WTO DSB.247

The awards language and other provisions of CAFTA-DR Chapter 10, as in NAFTA, provide little useful guidance to tribunals in determining the amount of the award, or the rate and period of interest, except when an expropriation is found. Under Article 10.7, there are detailed guidelines for determining the amount of compensation and the calculation of interest for takings coming within the scope of Arti-

242 See NAFTA, supra note 30, arts. 1125–1126.
243 CAFTA-DR, supra note 3, ch. 10, art. 10.26.1.
244 Id. ch.10, art. 10.26.2.
245 Id. ch.10, art. 10.26.3.
246 Id. ch. 10, art. 10.20.6.
247 See DSU, supra note 44, art. 15 (applicable only to panel decisions, not to decisions of the WTO Appellate Body); Menaker, supra note 77, at 128 (noting the similarity of this investment decision review procedure to that used in the WTO).
cle 10.7. For other violations of Section A, or for violations of investment authorizations or investment agreements (unless the latter specify calculation of damages), having found “that the claimant has incurred loss or damage by reason of, or arising out of, that breach,” the tribunals are left to their own to develop a proper measure of damages. Nevertheless, in the four cases under NAFTA in which the tribunal awarded damages, calculation of the amounts did not prove a major problem for the tribunal. As the arbitrators deemed appropriate, they used adjusted book value, the amount of the uncontented losses sustained by the claimant, a type of going concern value, and the approximate costs of the claimant because of the respondent’s denial of fair and equitable treatment.

Enforcement of an award is deferred for 120 days in the case of ICSID Convention arbitration, and 90 days in the event the arbitration was conducted under the ICSID Additional Facility or UNCITRAL Rules; then the award may be enforced if no party has requested annulment under ICSID or revision under the other two mechanisms. An award by a tribunal operating under the ICSID Convention Arbitra-

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248 CAFTA-DR, supra note 3, ch. 10, arts. 10.7.2–4. Arguably, a tribunal that found a taking that failed to comport with the expropriation requirements of Article 10.7 might take the position that the measure of compensation specified in that provision was inapplicable. See ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, ¶¶ 480–482, Oct. 2, 2006, available at http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf (last visited May 5, 2007) (holding that where there had been an unlawful expropriation under a bilateral investment treaty specifying only “just compensation,” it was appropriate for the tribunal to use a higher, customary international law standard of compensation, in that instance the market value of the investments as of the date of the award). However, under CAFTA-DR, a very explicit compensation standard is provided in Article 10, specifying fair market value at the time of the taking, and it seems unlikely that a tribunal would apply a different standard. CAFTA-DR, supra note 3, art. 10.7.2(b).

249 CAFTA-DR, supra note 3, ch. 10, arts. 10.16.1(a)(ii) and 1(b)(ii).

250 See Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 51–54 (2001) (book value was essentially used because the enterprise had never actually begun its operations; the tribunal equated fair and equitable treatment damages and expropriation damages because Metalclad had been deprived entirely of the use of its investment).

251 See Feldman v. Mexico, 42 I.L.M. 625, 665–667 (2003) (allowing only amount of cigarette tax refunds the majority believed were denied to claimant in violation of the national treatment provisions, plus interest, but denying other damage claims, including that based on expropriation).


253 Pope & Talbot Inc. v. Canada, 41 I.L.M. 1347, 1361, ¶¶ 84–85 (2002) (losses relating to management time and the need to shut down the facility for a week to comply with Canada’s unreasonable audit requests).

254 CAFTA-DR, supra note 3, ch. 10, art. 10.26.6.
tion Rules is subject to limited review, to annulment on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.\textsuperscript{255}

An \textit{ad hoc} committee of three is appointed from a panel of arbitrators, with the authority to annul the entire award or any part of it. If the committee annuls the award, either party to the arbitration may request that the dispute be submitted to a new tribunal.

The ICSID Annulment Committee procedures are not available for arbitral awards under either the UNCITRAL Rules or the ICSID Additional Facility Rules. In either instance, a court proceeding may be brought to set aside or annul the award in the state that has been designated as the situs of the arbitration.\textsuperscript{256} This has occurred several times in the NAFTA context, three times by Canadian federal or provincial courts and once by a federal court in the District of Columbia, with the award sustained in all instances.\textsuperscript{257} The criteria for review by the ICSID annulment committee are also relatively narrow, they require that: (1) the tribunal was not properly constituted; (2) the tribunal “manifestly exceeded its powers;” (3) there was corruption on the part of a member of the tribunal; (4) there was a “serious depar-

\textsuperscript{255}ICSID Convention, \textit{supra} note 78, art. 52 (emphasis added).
\textsuperscript{256}See NAFTA, \textit{supra} note 30, art. 1136.3.
ture from a fundamental rule of procedure; or (5) the award failed to state the reasons upon which it was based.258

Neither ICSID Annulment Committee nor national court review have been considered a fully satisfactory means of dealing with arbitral awards. Under such circumstances, the idea of a single appellate mechanism,259 perhaps modeled after the WTO’s Appellate Body, has received support from diverse sources. NGOs and some government agencies have been concerned about the lack of appeals, a situation that means ad hoc arbitrators cannot be controlled and any legal errors that are made cannot be effectively corrected for the current or for future cases. The use of the NAFTA Commission’s power to issue binding Interpretations (noted above), suffers from the uncertainties noted earlier, which may carry over to the CAFTA-DR Commission. In addition, arbitral decisions, even though not serving as precedent, are likely to be considered by subsequent tribunals. As a result, the President’s Trade Promotion Authority states:

[T]he principal negotiating objectives of the United States regarding foreign investment are . . . to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by . . . providing for an appellate body or similar mechanism to provide coherence to the interpretations of trade agreements . . . .260

(U.S. concerns are not shared by ICSID. In 2004, the secretariat proposed the creation of an appellate mechanism, but the proposal was later withdrawn.)261

Relatively weak language in the Singapore and Chile FTAs, and in later FTAs with Peru and Colombia,262 on this subject was replaced in

259 See Gantz, Appellate Mechanism, supra note 257, at 54–57.
CAFTA-DR with a much more explicit (and likely less realistic) directive that requires the Parties, within three months of the entry into force of CAFTA-DR, to set up a negotiating group “to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter.”

The negotiating group is to provide the Commission with a draft within one year of its establishment. The issues to be considered are enumerated, and include: (1) the composition; scope and standard of review; (2) transparency; (3) effect of decisions; (4) relationship to applicable arbitral rules; and (5) relationship to existing domestic and international laws on enforcement of arbitral awards.

Whether the negotiating group will be able to agree upon a proposal is at this writing an open question, as the legal and procedural challenges to creating a satisfactory appellate mechanism are not to be dismissed lightly. However, if successful, and if the mechanism is approved by the CAFTA-DR Parties, it might provide a greater level of certainty and predictability to arbitral awards under Chapter 10.

IV. Government-to-Government Disputes Under Chapter 20

A. NAFTA Antecedents of CAFTA-DR Dispute Settlement

The CAFTA-DR dispute settlement mechanism follows NAFTA Chapter 20 with some modifications; NAFTA in turn closely follows Chapter 18 of the U.S.-Canada Free Trade Agreement (CFTA). Given the inclusion of a provision in the 1947 GATT recognizing the need for a means to resolve disputes over the interpretation and application of trade agreements, and nearly forty years of third party dispute resolution under GATT and the WTO at the time of the CFTA negotiations, the issue in the NAFTA negotiations, and in later FTAs, was less whether there should be such a mechanism as to how it should be structured.

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262 “Within three years after the date of entry into force of the Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism,” Chile FTA, supra note 6, Annex 10-H; see also, e.g., Peru FTA, supra note 8, Annex 10-D.
263 CAFTA-DR, supra note 3, ch. 10, Annex 10-F, ¶ 1.
264 Id. Annex 10-F, ¶ 2.
265 Id. Annex 10-F, ¶ 1.
266 Gantz, Appellate Mechanism, supra note 257, at 57–73.
267 GATT, supra note 139, art. 23.
In most such situations, panels of trade experts appointed on an \textit{ad hoc} basis opine on the legal aspects of disputes between member governments, based on the “law” of the relevant international agreements (NAFTA or GATT and other WTO agreements), in a typical international arbitral procedure consisting of consultations, briefings, a hearing, and the issuance of an opinion or report. A draft of what is now the WTO’s Dispute Settlement Understanding (DSU)\textsuperscript{268} existed at the time of the NAFTA negotiations.\textsuperscript{269} While the NAFTA negotiators were aware of the DSU draft, there appears to have been relatively little “borrowing” from the DSU in NAFTA, Chapter 20, perhaps in part because of the desire of both Canada and the United States to avoid wholesale renegotiation of CFTA, Chapter 18.\textsuperscript{270} CAFTA-DR, in contrast, appears to reflect somewhat more significantly some of the provisions and practices under the DSU (as well as under NAFTA), since at the time of the CAFTA-DR negotiations, the governments had eight years of experience under the DSU.

The CFTA general dispute settlement system was considered to offer “a significant improvement to the traditional, pre-WTO GATT proceedings” by making the formation of a panel mandatory at the request of either Party and for providing deadlines for each stage of the process, but the rulings, as in GATT, were only recommendations, leaving the prevailing Party the option of retaliation.\textsuperscript{271} The scope of Chapter 20 is broader than CFTA largely because NAFTA is broader than CFTA, covering, inter alia, such areas as intellectual property, standards, sanitary and phytosanitary measures, and, to a limited degree, the environment.\textsuperscript{272} CAFTA-DR jurisdiction is broader still, because disputes over compliance with labor and environmental obliga-

\textsuperscript{268} DSU, \textit{supra} note 44.


\textsuperscript{270} See NAFTA, \textit{supra} note 30, art. 2019 (Chapter 20 of NAFTA took a similar approach to the DSU (art. 22.6) by providing a procedure to limit the level of sanctions imposed by the prevailing Party. Thus, Article 2019.3 makes available additional panel review if the retaliation level is considered “manifestly excessive.” This process, however, has never been invoked under NAFTA.).


\textsuperscript{272} See, e.g., NAFTA, \textit{supra} note 30, art. 104 (environmental agreements), ch. 7B (sanitary and phytosanitary measures), ch. 9 (standards), ch. 14 (financial services), ch. 17 (intellectual property).
tions are subject to Chapter 20, rather than to dispute resolution in separate “side” agreements.

The most recent NAFTA Chapter 20 panel decision was rendered in February 2001,\textsuperscript{273} six years ago and several years before the CAFTA-DR negotiations. There have been only three regular Chapter 20 panel decisions and one non-NAFTA proceeding using Chapter 20 rules.\textsuperscript{274} The jurisprudence is thus quite limited compared to the wealth of NAFTA investment dispute tribunal decisions,\textsuperscript{275} but is worth mentioning to provide a flavor of the types of disputes for which the mechanism has been utilized.\textsuperscript{276}

In the first, the United States charged that NAFTA required Canada to eliminate duties on certain dairy products (\textit{Dairy Products}). Under the WTO Agreement on Agriculture, Canada had agreed to “tarification” of dairy products (conversion of quantitative restraints to tariffs), but there is no obligation under the WTO to eliminate tariffs. Under NAFTA, in contrast, all tariffs must be eliminated within no more than fifteen years. Canada took the position that these items were exempt from the NAFTA tariff reductions; the United States disagreed. Although NAFTA does not specify the use of a neutral country fifth arbitrator, a panel consisting of two Canadian and two U.S. law professors


\textsuperscript{274} The Softwood Lumber Agreement, May 29, 1996, 35 I.L.M. 1195, 1200–1 (1996) sought (unsuccessfully in retrospect) to resolve a long-running dispute between Canada and the United States over Canada lumber exports to the United States, and contained an \textit{ad hoc} dispute settlement mechanism that is based in part on NAFTA Chapter 20 (Art. V). An arbitral panel was convened in November 1998 to address an alleged violation of the agreement as a result of British Columbia’s reduction of certain charges for harvesting timber from government-owned lands, “In the Matter of British Columbia’s June 1, 1998 Stumpage Reduction.” The panel, operating generally under the NAFTA Chapter 20 Rules of Procedure, reviewed briefs submitted by the Parties, held a hearing and drafted a decision, but the case was settled by the Parties one day before the decision was due. See Exchange of Diplomatic Notes, Aug. 26, 1999, \textit{available at} http://canada.usembassy.gov/content/can_usa/lumbamen.pdf (last visited Feb. 26, 2007).

\textsuperscript{275} Also, there have been more than 100 actions filed under the procedures set out in NAFTA, Chapter 19 (not replicated in CAFTA-DR or any subsequent U.S., Mexican or Canadian FTA). See NAFTA SECRETARIAT, \textit{Status Report: NAFTA & FTA Dispute Settlement Proceedings} (2006), http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=9.

was chosen, with a British law professor as chairperson. The panel ultimately determined unanimously that Canada’s actions were consistent with NAFTA.\(^{277}\)

In *Broom Corn Brooms*, Mexico challenged the U.S. application of safeguards to corn brooms from Mexico. Mexico argued that the application of the safeguards was inconsistent with NAFTA, Chapter 8 and with the WTO Agreement on Safeguards. The panel, chaired by an Australian government official, found unanimously in favor of Mexico, holding that the U.S. International Trade Commission had violated NAFTA by failing to explain adequately its “domestic industry” determination.\(^{278}\)

*Cross Border Trucking Services* involved U.S. refusal to implement a NAFTA provision requiring the United States and Mexico, as of December 1995, to permit each other’s trucking firms to carry international cargoes between the ten Mexican and four U.S. border states. Investment by Mexican firms in U.S. trucking companies had also been blocked. Mexico had charged that the United States had violated the national treatment and most-favored nation treatment provisions of Chapter 11 (investment) and Chapter 12 (cross-border services), as well as the specific provisions of Annex I imposing such obligations. The Panel ultimately unanimously agreed with Mexico, although in recognition of legitimate safety concerns in the United States, it held that “to the extent that the inspection and licensing requirements for Mexican truckers and drivers wishing to operate in the United States may not be ‘like’ those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable.”\(^{279}\)

Insofar as the author has been able to determine,\(^{280}\) at least ten other matters have reached at least the consultation stage under Chap-


\(^{280}\) There remains a possibility that other formal requests for consultations were lodged at one time or another, without ever becoming public.
Some of these were resolved through consultations, although most of the details are unknown, suggesting that with NAFTA, Chapter 20, as with most formal dispute settlement mechanisms, success cannot be measured solely by the number of cases that went to term.

The NAFTA impact on CAFTA-DR Chapter 20 necessarily reflects some apparent unhappiness on the part of the United States with NAFTA’s Chapter 20. The U.S. government had not been fully satisfied with the results under CFTA, Chapter 18; several of the five cases decided under those proceedings were thought to be poorly reasoned decisions, and there was no reason to believe that Chapter 20 would work better. Thus, even from the outset, there was healthy skepticism of the process on the part of U.S. officials. Perhaps more significantly, some issues, such as those involving dumping and illegal subsidies, effectively require resolution by the WTO’s DSB because they are not covered by Chapter 20.

### Footnotes


282 U.S. reluctance to use Chapter 20 is well illustrated by the Mexican Sugar case concerning U.S. market access to Mexican sugar under a NAFTA Side Letter, which Mexico considers directly related to a dispute over Mexican taxes imposed on beverages using high fructose corn syrup instead of sugar that are sold in Mexico. The Chapter 20 case technically remains pending, but U.S. authorities have refused for more than four years to appoint panelists, a refusal that was effectively supported by a WTO panel. Mexico-Tax Measures on Soft Drinks and Other Beverages, Appellate Body Report, WT/DS308/AB/R, adopted Mar. 24, 2006, available at http://www.wto.org. The Appellate Body upheld a panel decision rejecting Mexico’s request that the panel and appellate body decline to exercise WTO jurisdiction because the matter was “inextricably linked to a broader dispute” which only a NAFTA [Chapter 20] panel could properly decide. The Appellate Body concluded that once it was established that a WTO panel had jurisdiction, it could not refuse to exercise it. See id. ¶¶ 10, 40, 57. That case has apparently been resolved by the United States and Mexico, but not through the Chapter 20 mechanisms. See Daniel Pruitt, *U.S., Mexico Reach Agreement on WTO Soft Drink Dispute Compliance Deadline*, 23 *Int’l Trade Rep.* (BNA) 1069 (2006) (discussing a settlement in which Mexico will implement a WTO decision holding that an excise tax on corn syrup violates WTO rules); *USTR Announces Sugar Quota Allocations; Producers Cite ‘Disorder’ in Import Increase*, 23 *Int’l Trade Rep.* (BNA) 1191 (2006) (indicating that Mexico’s sugar quotas for 2006 and 2007 have been increased).

283 Discussion with a former U.S. government official involved in both CAFTA Chapter 18 and NAFTA Chapter 20 negotiations. Memorandum of Conversation (May 31, 2005) (on file with author).
excluded from NAFTA jurisdiction, or because the NAFTA Parties preferred to take their frequent disputes over “unfair” trade actions to Geneva. Those who expect adjudicatory systems to follow set time limits and strict procedural rules are likely to find the NAFTA Chapter 20 system wanting, in part because of the inherent difficulty in forming panels where there is no independent secretariat—in either NAFTA or CAFTA-DR—to assure that deadlines are met. Presumably, there is hope on the part of the U.S. negotiators that adaptation of some of the WTO’s post-decision procedures, discussed below, will improve the operation of the CAFTA-DR mechanism compared to that of NAFTA.

The CAFTA-DR mechanism thus begins its existence under something of a cloud reflecting U.S. dissatisfaction with the operation of NAFTA, Chapter 20. Nevertheless, it can be hoped that all of the CAFTA-DR governments realize that such a mechanism in CAFTA-DR is necessary, even if they do not necessarily have full confidence in its viability.

B. The Chapter 20 Mechanism

1. Functions of the Free Trade Commission

In CAFTA-DR, unlike NAFTA, the Free Trade Commission is treated under a separate Chapter 19, rather than in the dispute settlement Chapter 20. The Free Trade Commission is comprised of cabinet level representatives or their delegates, like NAFTA, and the Agreement specifies the responsible ministries and officials for each country. These are the ministries of economy (El Salvador, Guatemala), industry and commerce (Dominican Republic, Honduras), development, industry and commerce (Nicaragua) and foreign commerce (Costa Rica). For the United States, the commissioner is the USTR. The same agencies, but at the director general (or Assistant USTR) level, are also designated the “free trade coordinators.” The Commission’s responsibilities go well beyond dispute settlement, and include: (1) supervision

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284 NAFTA, supra note 30, art. 1901.3 (providing that “[N]o provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.”).

285 This is in contrast to the WTO’s DSB, where the secretariat in most cases has been able to keep the panel selection process moving forward promptly.


288 Id. ch. 19, art. 19.2, Annex 19.2.
of implementation of the Agreement; (2) overseeing the “further elaboration” of the Agreement (e.g., establishing a negotiating group under Annex 10-F to consider a mechanism for review of arbitral decisions in investor-state disputes); (3) resolution of disputes over the interpretations of the Agreement; (4) supervision of committees and working groups; and (5) other matters that may affect the operation of the Agreement.289

The Commission is also authorized to “establish and delegate responsibilities to committees and working groups;” modify tariff schedules, rules of origin, and interpretative guidelines for the customs and rules of origin chapters; modify annexes for the government procurement chapter; issue interpretations of Agreement provisions; seek advice of non-governmental persons or groups; and take other actions agreed upon.290 Most significantly, for this discussion, the Commission is empowered with administrative coordination of the Chapter 20 dispute settlement mechanism, and each Party is required to designate an office to provide administrative assistance, to be responsible for the operation and costs of the office, and to provide fees and expenses for panelists and experts in the Chapter 20 process.291 These latter functions have been exercised by national sections of the NAFTA Secretariat,292 and one may reasonably assume that the CAFTA-DR process will operate in the same manner, albeit without the actual creation of a CAFTA-DR secretariat.

2. The Dispute Settlement Process

As in NAFTA, the CAFTA-DR parties are encouraged to “endeavor to agree on the interpretation and application of this Agreement,” and to cooperate and consult on matters affecting its operation.293 The basic applicability of the dispute settlement provisions is the same as in NAFTA,294 but in CAFTA, it is outlined in greater detail:

(a) with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;

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289 Id. ch. 19, art. 19.1.2.
290 Id. ch. 19, art. 19.1.3.
291 CAFTA-DR, supra note 3, ch. 19, art. 19.3.
292 See NAFTA, supra note 30, art. 2002.
293 CAFTA-DR, supra note 3, ch. 20, art. 20.1; NAFTA, supra note 30, art. 2003.
(b) wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement; and

(c) wherever a Party considers that an actual or proposed measure of another Party causes or would cause nullification or impairment in the sense of Annex 20.2.  

“Nullification or impairment” is defined along the lines of GATT, in terms of actions by a Party which are not violations of the Agreement, but nevertheless “nullify or impair” “any benefit it [the other Party] could reasonably have expected to accrue to it” under the provisions of chapters relating to: (1) national treatment, market access, rules of origin and customs administration/trade facilitation; (2) technical barriers to trade; (3) government procurement; (4) cross-border services trade; or (5) intellectual property rights. 

A Party seeking dispute settlement must normally make an election among Chapter 20, another free trade agreement to which the disputing Parties are Party (for example, a Free Trade Area of the Americas agreement if one is ever negotiated), and the WTO’s DSB. Once a forum has been chosen, “the forum selected shall be used to the exclusion of the others,” but certain disputes—such as those relating to unfair trade practices and to application of sanitary and phytosanitary provisions—may be submitted only to WTO dispute settlement, not to CAFTA-DR Chapter 20. NAFTA contains substantively similar language, while requiring that certain matters relating to environmental, standards or sanitary and phytosanitary issues be exclusively resolved under NAFTA, Chapter 20. Conflicts over choice of forum have arisen at least once under NAFTA, when Mexico requested a WTO panel to refrain from exercising jurisdiction over a dispute with the United States involving a tax on soft drinks made with high fructose corn syrup, on the grounds that the issues should be resolved in a NAFTA Chapter 20 proceeding initiated by Mexico (the latter focusing on Mexico’s access to the U.S. sugar market).

295 CAFTA-DR, supra note 3, ch. 20, art. 20.2.
296 Id. ch. 20, Annex 20.2.
297 Id. ch. 20 art. 20.3 (choice of forum generally); see also id. ch. 8, art. 8.8 (excluding dumping and countervailing duty matters) and ch. 6, art. 6.2.2 (excluding sanitary and phytosanitary disputes).
298 See NAFTA, supra note 30, art. 2005.
However, the WTO panel and appellate body held that they had no authority to decline to exercise jurisdiction.299

As in many international arbitration regimes, and in the NAFTA and WTO DSBB, the process in CAFTA-DR begins with a written request for consultations, with copies sent to the other Parties to the Agreement.300 The reasons, the legal basis for the complaint, and the “actual or proposed measure or other matter at issue” must all be identified. Another Party may participate in the consultations upon request within seven days of notice (five days for perishable goods).302 Should consultations be unsuccessful in resolving the dispute within sixty days of the request (fifteen days for perishable goods), any consulting party may request the Commission to exercise good offices, consultation, and mediation.303 A similar request may be lodged when consultations have been held under the labor, environment, or standards provisions of the Agreement.304 The Commission is directed to meet within ten days of the request and “shall endeavor to resolve the dispute promptly.” At its discretion, the Commission may call technical advisors, have recourse to other good offices, conciliation or mediation procedures, or make recommendations, all with the objective of assisting “the consulting Parties to reach a mutually satisfactory resolution of the dispute.”305 Multiple proceedings regarding the same measure are to be consolidated.306

Should the matter be unresolved within thirty to seventy-five days after the request to the Commission (depending on whether the matter has been consolidated or involved perishable goods, or whether the Commission has actually convened), any of the consulting Parties that requested the Commission to meet “may request in writing the establishment of an arbitral panel to consider the matter.”307 Here, as in NAFTA, the requests for consultations and a meeting of the Commission are conditions precedent for the request for convening of an arbitral panel. This means that other than for perishable goods,

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299 Mexico-Tax Measures on Soft Drinks and Other Beverages, supra note 281, ¶¶ 44–57.
300 NAFTA, supra note 30, art. 2006; DSU, supra note 44, art. 4.
301 CAFTA-DR, supra note 3, ch. 20, art. 20.4.2.
302 Id. ch. 20, art.20.4.3.
303 Id. ch. 20, art. 20.5.1.
304 Id. ch. 20, art. 20.5.2.
305 Id. ch. 20, art. 20.5.4.
306 CAFTA-DR, supra note 3, ch. 20, art. 20.5.5.
307 Id. ch. 20, art. 20.6.1.
it will be at least ninety days between the request for consultations and the request for establishment of a panel (sixty days at the consultation stage and at least thirty days at the conciliation stage). In the WTO’s DSB, consultations are mandatory, but conciliation is not; a complaining Member may request the formation of a panel sixty days after the request for consultations if the matter has not been resolved by consultations. The panel request, however, may be blocked (until the next DSB meeting) by any Member at the first monthly DSB meeting at which the request is lodged, meaning that in the WTO system it normally takes ninety days from request for consultation to the DSB’s order to form an arbitral panel.\textsuperscript{309}

As in NAFTA and in the WTO, CAFTA-DR provides for the establishment of a standing roster of persons to serve as panelists, within six months after the Agreement enters into force.\textsuperscript{310} NAFTA required the establishment, by January 1, 1994, of a roster of up to thirty persons,\textsuperscript{311} but the NAFTA Parties have been unable to agree on such a formal roster, thirteen years after NAFTA entered into force. Rather, under NAFTA Chapter 20, panelists have been selected on an \textit{ad hoc} basis (with a complaining Party selecting two nationals of the other Party, and vice versa—a practice abandoned in CAFTA-DR) and the chairperson of the five person panel being selected by the disputing Parties from non-NAFTA citizen experts. This has occurred despite language that indicates that in the absence of agreement between the disputing Parties on a chair, the chairperson should be selected by a disputing Party chosen by lot, with the only restriction that the chair not be a national of that disputing Party.\textsuperscript{312} With CAFTA-DR, as in NAFTA, panelists must have “expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements . . . .”\textsuperscript{313} They are to be chosen “on the basis of objectivity, reliability, and

\textsuperscript{309} DSU, \textit{supra} note 44, arts. 4.7, 6.1.

\textsuperscript{310} This likely means six months after the Agreement enters into force for the last of the seven Parties.

\textsuperscript{311} NAFTA, \textit{supra} note 30, art. 2009.

\textsuperscript{312} \textit{Id.} art. 2011. For example, in \textit{Cross-Border Trucking Services}, the two U.S. panelists were selected by Mexico, the two Mexican Panelists by the United States, and the chair—a British barrister—by the two governments, in a process that required 15 months. \textit{See In re Cross-Border Trucking Servs. (Mex. v. U.S.), Secretariat File No. USA-MEX-98-20008-01 (NAFTA Arbitration Feb. 6, 2001), ¶¶ 21–24, http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf (relating the proceedings from the request for a panel on September 22, 1998 to its ultimate formation February 2, 2000).}

\textsuperscript{313} CAFTA-DR, \textit{supra} note 3, ch. 20, art. 20.7.2(a).
sound judgment” and be independent of the government; they must comply with a code of conduct established by the Commission.\footnote{Id. at art. 20.7.2 (b)–(d). When the dispute involves financial services issues, a separate roster of persons with experience in financial services law or practice is used to the exclusion of the Chapter 20 roster. Id. ch. 12, art. 12.18. There have been no such disputes under NAFTA.}

In a significant departure from the NAFTA text, where at least four of the five panelists in a given case are citizens of the disputing Parties,\footnote{See NAFTA, supra note 30, art. 2011.1 (where each disputing Party chooses two nationals of the other disputing Party to serve).} CAFTA-DR provides that unless otherwise agreed, of the seventy individuals selected to be roster members, up to eight will be from each Party, and up to fourteen of the seventy will be persons who are not nationals of any Party. All are to be appointed by consensus, for a minimum of three years.\footnote{CAFTA-DR, supra note 3, ch. 20, art. 20.7.1.} In part, this change likely reflects the actual practice under NAFTA, where in each of the three cases the chairperson was a national of a country other than the disputing Parties.

The process for selecting panelists in individual disputes in CAFTA-DR is similar to that in NAFTA, with the important explicit proviso that if there is not agreement on a chair within fifteen days of the request for establishment of the panel, the chair is to be chosen by lot among the (fourteen) roster members that are non-nationals of a disputing Party.\footnote{Id. ch. 20, art. 20.9.1(b).} Each party is to select its own panelist, “normally” from the roster, with any person selected other than from the roster subject (as in NAFTA\footnote{See NAFTA, supra note 30, art. 2011.3.}) to a peremptory challenge by the other Party,\footnote{CAFTA-DR, supra note 3, ch. 20, arts. 20.9.1(c), 20.9.2.} again putting a premium on selection from the roster. If either Party has failed to designate a panelist within fifteen days after selection of the chair, that panelist is selected by lot from the (eight) nationals of that Party on the roster.\footnote{Id. ch. 20, arts. 20.9.1(c), 20.9.1(d).} It can thus be hoped that the CAFTA-DR parties will agree promptly on a group of panelists, even if the initial agreed group is much fewer than seventy persons.

Whether this panel selection process will work better than that under Chapter 20 remains to be seen. Consensus among seven governments on seventy panelists may be difficult to achieve; consensus among the three governments on thirty NAFTA panelists has remained elusive. Without a permanent roster, the rest of the panel se-
lection process will likely break down, causing significant delays as the disputing Parties argue about panel selection, and delays along the lines of those found under NAFTA—six to sixteen months or longer—are likely to occur.  

The Commission is to establish rules of procedure for the operation of the panels, which will presumably be quite similar to the NAFTA Chapter 20 Rules of Procedure. Under NAFTA, as under CAFTA-DR, there must be at least one hearing. However, the remaining rules depart significantly from NAFTA provisions. There is no provision for transparency in NAFTA, and thus all submissions were confidential. In *Dairy Products*, there was even a short-lived effort to keep the names of the panelists (other than the chairperson) confidential! The hearings in the most recent NAFTA, Chapter 20 case, *Cross Border Trucking Services*, held in May 2000, were not public.

Nor were the transparency measures dictated by the NAFTA Commission with regard to Chapter 11 investor-state disputes (discussed in Part IV, above) extended to proceedings under NAFTA, Chapter 20, although discussions among the NAFTA Parties to this end have apparently been taking place for some time. This may well reflect the lack of any general rule of transparency for government-to-government disputes in the WTO, and it is highly unlikely that most of the WTO Members would support open hearings and prompt disclosure of briefs. Notwithstanding that general view, several key WTO Members, the United States, Canada, and the European Union, have authorized the panel to make *ad hoc* arrangements to open hearings to the public via closed circuit television for hearings affecting those parties (but not for other WTO Members who appeared in the matter as third parties).

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324 See NAFTA Chapter 20 Panel Selected in Farm Tariff Flap with Canada, 13 *Int’l Trade Rep.* (BNA), vol. 13, no. 4 (Jan. 24, 1996) (reporting the name of the chairperson by stating “A USTR spokeswoman confirmed that panelists have been selected but said that their names were not yet available.”).

325 The author, as one of the panelists, was present.

326 E-mail communication from Meg Kinnear, International Trade Canada, to the Author (Sept. 5, 2006) (on file with author).

327 See WTO, COMMUNICATION FROM THE CHAIRMAN OF THE PANELS, WT/DS380/8, WT/DS321/8 IN UNITED STATES—CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC-HORMONES DISPUTE, WT/DS320; CANADA—CONTINUED SUSPENSION OF OBLIGATIONS IN
In CAFTA-DR, in contrast, the rule is transparency, and this is a significant innovation for government-to-government dispute resolution, which has tended to keep disputes under wraps at least until they are resolved. Although confidential information may be protected, the hearings must generally be open to the public; the Parties’ initial and rebuttal briefs are public except for confidential information; the panel is to consider requests from NGOs to provide their views (amicus curiae briefs) that “may assist the panel in evaluating the submissions and arguments of the disputing parties.”

In addition, unlike NAFTA, where specific panelists are not to be associated with any minority or majority opinions, under CAFTA-DR, “panelists may furnish separate opinions on matters not unanimously agreed.”

Other Parties to CAFTA-DR that are not parties to the particular dispute may, upon written request, fully participate in the proceedings through attendance at hearings and making and receiving written and oral submissions, with those submissions “reflected in the final report of the panel.” Substantially identical language appears in NAFTA and the NAFTA Party that is not a disputing Party has routinely participated in Chapter 20 proceedings. Similarly, the NAFTA language permits either a disputing Party or the panel on its own initiative, “to seek information and technical advice from any person or body that it deems appropriate” subject to agreement on terms and conditions by the Parties. However, NAFTA language providing for the use of a scientific review board for environmental or other scientific issues does not appear in CAFTA-DR. Separate opinions are permitted when the panel is not unanimous.

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328 CAFTA-DR, supra note 3, ch. 20, art. 20.10.1.
329 NAFTA, supra note 30, art. 2017.2.
330 CAFTA-DR, supra note 3, ch. 20, art. 20.13.5.
331 Id. ch. 20, art. 20.11.
333 CAFTA-DR, supra note 3, ch. 20, art. 20.12; NAFTA, supra note 30, art. 2014.
334 See NAFTA, supra note 30, art. 2015.
335 CAFTA-DR, supra note 3, ch. 20, art. 20.13.5.
CAFTA-DR, like NAFTA, contains time limits for the proceedings; in CAFTA-DR, the initial report of the panel is to be circulated to the Parties “within 120 days after the last panelist is selected or such other period as the Model Rules of Procedure . . . may provide.”

This initial report is to contain findings of facts, the panel’s “determination as to whether a disputing Party has not conformed to its obligations under this Agreement” or of nullification or impairment, along with recommendations if the Parties have so requested. The 120 day rule is not hard and fast; the panel may request more time, advising the Parties of the reasons for the delay and an estimate of the additional time required, with the caveat that “in no case should the period to provide the report exceed 180 days.”

While the initial period is 120 days, instead of the ninety days provided in NAFTA, it is still unlikely that the panels will be able to complete this step of their work in four months. The major delays will likely relate to the briefing schedule and scheduling of a hearing at a time that is convenient for several governments and three panelists. In *Cross-Border Trucking Services*, for example, the final panelist was selected on February 2, 2000; the briefs were very promptly submitted by Mexico, the United States, and Canada on February 14, February 23, April 3, and April 24; and the hearing was held on May 17, 2000. Post-hearing submissions were solicited by the panel for submission June 1, later extended to June 9 by request of the Parties.

Thus, the hearing in *Cross-Border Trucking Services* took place 106 days after the last panelist was selected, and the case was not under submission until 128 days after panel selection. There were no unusual delays in the briefings or the hearing; the Parties and the panelists all acted promptly in light of the complexities of the legal and factual issues. Yet the period of time for the case to be ripe for panel decision was thirty-eight days *in excess* of the NAFTA time limit, and eight days in excess of the CAFTA-DR limit, suggesting that both may be impractical unless the Parties are willing to accept very short filing and response periods for their submissions. However, in most cases, it

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337 *Id.* ch. 20, art. 20.13.3.
338 *Id.* ch. 20, art. 20.13.4.
341 *Id.* ¶ 30.
should be possible for the panelists to complete the interim report within 180 days; this will be easier under CAFTA-DR than under NAFTA, because there are only three panelists rather than five.342

Strong administrative assistance by the national offices designated to provide administrative assistance to panels343 will facilitate panel compliance with the deadlines; weak administrative assistance will make such compliance much less likely.

It is anticipated that the Parties will provide comments on the interim report to the panel within fourteen days of the presentation of the report, unless the Parties agree to another period,344 with the panel expected to render a final report sixteen days later.345 The thirty-day time limit is the same as in NAFTA.346 It seems unlikely that this time limit will be strictly met, although the Parties and panelists should be able to come reasonably close. Again based on the author’s personal experience, such comments are normally quite valuable to panels and are studied carefully by the panelists; even if the result itself does not change, the governments’ superior knowledge of details may help the panel avoid both factual and legal errors.

3. Implementation of Decisions

Once the final report is provided to the Parties, “the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.”347 Where the panel finds that a “disputing Party has not conformed with its obligation under this Agreement, or that a disputing Party’s measure is causing nullification or impairment . . . the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.”348 In other words, if a panel finds

342 However, it is worth keeping in mind that the three panelists will be located in three different countries, likely in different time zones (particularly if the chairperson is not from the Western Hemisphere), and are likely to have day jobs. These factors significantly complicate conference calls and post-hearing meetings of the panelists. (The panelists are ad hoc, NAFTA panelists are paid at the rate of CDN$800 per day, currently about US$720 per day. One can reasonably assume that the CAFTA-DR Commission will set a similar rate, although presumably not in Canadian dollars.) Also, in most cases, it will probably be necessary for the panel to render its opinion in both English and Spanish, requiring additional time for translation.

343 CAFTA-DR, supra note 3, ch. 19, art. 19.3.1(a).

344 Id. ch. 20, art. 20.13.6.

345 Id. ch. 20, art. 20.14.1.

346 See NAFTA, supra note 30, art. 2017.1.

347 CAFTA-DR, supra note 3, ch. 20, art. 20.15.1 (emphasis added).

348 Id. ch. 20, art. 20.15.2 (emphasis added).
a violation, the violating Party is expected to correct it, but they have some flexibility to work things out if both can agree on a solution.

If, however, compliance satisfactory to the prevailing Party does not occur within forty-five days, the Parties are expected to enter into negotiations “with a view to developing mutually acceptable compensation.” If the negotiations are not successful in an additional thirty days, or if compensation agreements are not complied with, the complaining Party may retaliate through the usual (under the WTO and other trade agreements) suspension of benefits, subject to notification as to what the complaining Party believes are “benefits of equivalent effect” to the protested measure. Where the losing Party believes that the suspension of benefits proposed is “manifestly excessive,” it may request that the panel reconvene to consider the level of compensation.

The opportunity to review the level of compensation demanded by the complaining Party at the outset is something of a departure from NAFTA, where the alleged excessiveness of the benefits could only be challenged after the fact. Under CAFTA-DR, it is contemplated that a challenge that the suspension is manifestly excessive is to be resolved by the panel before any suspension takes place, with the suspension of trade benefits then being in the amount determined by the panel, unless the panel fails to determine the proper level of suspension. This more closely resembles the parallel requirements in the DSU. However, unlike the DSU, where there have been several proceedings in which the losing Party objected to the magnitude of benefits to be suspended, there is little relevant experience in NAFTA. In the first de-

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349 Id. ch. 20, art. 20.16.1.
350 DSU, supra note 44, art. 22.
351 CAFTA-DR, supra note 3, ch. 20, art. 20.16.2.
352 Id. ch. 20, art. 20.16.3.
353 See NAFTA, supra note 30, arts. 2019.1–4 (providing for the complaining Part to suspend benefits after 30 days, and also for the establishment of a new panel to determine whether the suspension is manifestly excessive, with that panel to render a decision within 60 days after the last panelist is chosen, or as otherwise agreed).
354 CAFTA-DR, supra note 3, ch. 20, arts. 20.16.3–4.
355 See DSU, supra note 44, arts. 22.2, 22.6 (where the Member seeking to suspend benefits “may request authorization from the DSB to suspend the application to the Member concerned of concessions under the covered agreements” and the losing Party may contest the requested suspension levels).
cision, *Dairy*, the panel found no violation of NAFTA by Canada, so no question of compliance arose. In *Broom Corn Brooms*, Mexico had already suspended certain concessions as was their right in a safeguards matter, and continued the suspension until the United States lifted the safeguards measures nine months later. In *Cross-Border Trucking Services*, there has been a long-standing disagreement between the United States and Mexico regarding implementation of the panel ruling, but no request for suspension of benefits, perhaps because of continued Mexican trucking industry opposition to opening the border. A settlement appears to have been reached in late February 2007, but whether it will be implemented or blocked by U.S. Congressional opponents is unclear.

A similar type of challenge is available under Article 20.16.3(b) to the respondent Party if the complaining Party considers that “it has eliminated the non-conformity or the nullification or impairment that the panel has found.” A “compliance review” is available under Article 20.18 after sanctions have actually been applied, providing that “if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the complaining Party or Parties.” If the panel agrees, the complaining Party or Parties are required to “promptly reinstate any benefits that Party has or those Parties have suspended . . . .”

This review of compliance or non-compliance with the panel’s finding of a violation resembles the WTO “Article 21.5” procedure, although in most instances at the WTO it is the complaining Member, not the respondent Member, that asks the panel to determine that the alleged compliance was not in fact sufficient. The United States has been on both sides of this process in the WTO experience, which may have led, at least in part, to inclusion of this language in CAFTA-DR.

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359 CAFTA-DR, *supra* note 3, ch. 20, art. 20.16.3(b).

360 Id. ch. 20, art. 20.18.1.

361 Id. ch. 20, art. 20.18.2.

362 See DSU, *supra* note 44, at 1238, art. 21.5 (permitting either disputant to challenge alleged compliance with a DSB ruling).

As in NAFTA and the DSU,\textsuperscript{364} in CAFTA-DR suspension of benefits is to be in the same sector as affected by the measure, unless this is “not practicable or effective.” In that instance, benefits may be suspended in other sectors.\textsuperscript{365}

A major innovation in CAFTA-DR is to provide the Parties with an alternative to suspension of benefits; the Party committing the violation may, by written notice to the complaining Party, agree to pay annual monetary damages, in U.S. dollars to the complaining Party, in lieu of suspension of trade benefits. If there is no agreement on the amount, it is set at fifty percent of the level of trade sanctions, as determined by the panel, or if there is no panel determination of amounts, by the complaining Party.\textsuperscript{366} The Commission may, however, determine, “when circumstances warrant,” that the assessment “be paid into a fund established by the Commission and expended at the direction of the Commission for appropriate initiatives to facilitate trade between the disputing Parties . . . .”\textsuperscript{367} It is not entirely clear how the sequencing would work in terms of proposed suspension of benefits, a panel determination of the amount of benefits, a request for the alternative of a monetary assessment and a possible Commission decision (by consensus) to use the funds for trade facilitation instead, but it is certainly an interesting departure from the traditional suspension of benefits approach.

4. Special Rules for Labor and Environmental Disputes

Another major change results from Chapter 20 jurisdiction over possible violations of CAFTA-DR’s requirements for enforcement of national labor and environmental laws. Separate rosters of up to twenty-eight persons each are to be designated for resolution of disputes arising under the labor and environmental chapters of CAFTA-DR, all persons with experience in the respective areas, possessing “objectivity, re-

\textsuperscript{364} See NAFTA, supra note 30, art. 2019.2; DSU, supra note 44, art. 22.3.
\textsuperscript{365} CAFTA-DR, supra note 3, ch. 20, art. 20.16.5.
\textsuperscript{366} Id. ch. 20, art. 20.16.6.
\textsuperscript{367} Id. ch. 20, art. 20.16.7.
liability and sound judgment,” and acting independently of the governments.368

Chapter 20 jurisdiction over labor and environmental issues is arguably narrower than other actions inconsistent with the Agreement. For example, not every failure to enforce labor laws is grounds for initiating dispute settlement. Rather, the obligation is as follows: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, after the date of entry into force of this Agreement.”369 Similar language circumscribes actions under the environmental Chapter 17.370

Moreover, if a panel finds non-compliance with these labor or environmental obligations, there is no option of suspension of trade benefits. Rather, CAFTA-DR provides for an “annual monetary assessment” to be determined by the panel, with the panel taking into account such factors as: (1) the trade effects of the non-enforcement; (2) its pervasiveness and duration; (3) the reasons for non-enforcement; (4) the level of enforcement “that could be reasonably expected of the Party given its resource constraints;” (5) efforts of the party to remedy non-enforcement; and (6) any other relevant factors.371 The monetary assessment is to be paid in U.S. dollars, but not to the complaining Party. Rather, the assessment amounts, which are limited to fifteen million dollars annually:372

[A]re to be paid into a fund established by the Commission and shall be expended at the direction of the Commission for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law.373

Insulating labor and environmental violations from trade sanctions is one of the more controversial aspects of CAFTA-DR, but one may reasonably assume that, as under the North American Agreement on Environmental Cooperation (NAAEC) where there have been no arbitrations, cases involving these issues that reach Chapter 20 will be few, due to the relatively high threshold. Given the innovative nature of the

368 Id. ch. 16, art. 16.7 (labor), ch. 17, art. 17.11 (environment).
369 Id. ch. 16, art. 16.2.1(a) (emphasis added).
370 CAFTA-DR, supra note 3, ch. 17, art. 17.2.1(a).
371 Id. ch. 20, arts. 20.17.1–2.
372 Adjusted for inflation beginning January 2006. Id. ch. 20, art. 20.17.2.
373 Id. ch. 20, art. 20.17.4.
use of monetary assessments as an alternative to trade sanctions generally, and as the only remedy for non-compliance in labor and environmental disputes, it is not surprising that there is a mechanism which provides for a review of the effectiveness of these provisions (Articles 20.17 and 20.18) after five years, or after monetary assessments have been assessed in five proceedings, whichever comes first.\footnote{Id. ch. 20, art. 20.19.} This suggests, in contrast, that the Parties during the negotiations believed that the innovative dispute settlement mechanism under Chapter 20, and the monetary penalty route, would be used on a regular basis.

\section*{C. Domestic Proceedings and Private Commercial Disputes}

The three articles in this final section of Chapter 20 reflect several carry-over provisions from NAFTA. CAFTA-DR, like NAFTA, incorporates a mechanism, perhaps patterned loosely on the “preliminary rulings” jurisdiction of the European Court of Justice:\footnote{Consolidated Version of the Treaty Establishing the European Community, art. 234 (as in effect 2002), available at http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf (last visited May 5, 2007) (the European Court of Justice has jurisdiction to give preliminary rulings, inter alia, concerning “the interpretation of this treaty . . . .”; “When such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”).} If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.\footnote{CAFTA-DR, supra note 3, ch. 20, art. 20.20.1; NAFTA, supra note 30, art. 2020.1 (with virtually identical language).}

If the commission issues an “agreed interpretation,” that interpretation must be submitted by the Party in whose territory the court or tribunal is located to that court or tribunal, “in accordance with the rules of that forum.”\footnote{CAFTA-DR, supra note 3, ch. 20, art. 20.20.2.} However, if the Commission cannot agree, “any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.”\footnote{Id. ch. 20, art. 20.20.3.}
This mechanism, although never used under NAFTA, could potentially be very useful in providing guidance on complex issues arising out of CAFTA-DR. Whether it can actually function effectively depends in large part on the efficiency of the Commission. The Commission is not a court with independent judges such as the European Court of Justice, but is comprised of political appointees. It is thus difficult to predict whether it will be able to deal with legal issues on a timely basis, if at all. Hopefully, the Commission will issue regulations that detail procedures for considering requests for advice under this Article 20.20, including time limits for doing so. Should, as is likely, the Commission be unable or unwilling to serve this function, the provision also gives the Party that is concerned about a particular issue before another Party’s court (most likely the United States) an opportunity to make its own views known.

In CAFTA-DR, as in NAFTA, private actions against another Party on the grounds that a measure of another Party is inconsistent with the Agreement (NAFTA), or that the other Party has failed to conform to its obligations under the Agreement (CAFTA-DR) are barred. This reflects long-standing U.S. policy and language found in legislation that approves trade agreements. It is probably significant for the other CAFTA-DR nations as well. Most nations in Latin America use a pure “monist” system, in which treaties are fully self-executing, that is, in which once approved and in force, treaties automatically have direct applicability by government agencies, courts, and private parties, even where they create conflicts with existing statutes. In theory, since

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379 See NAFTA, supra note 30, art. 20.21; CAFTA-DR, supra note 3, ch. 20, art. 20.21.
380 See CAFTA Implementation Act, 19 U.S.C. § 4012(c) (2006) (“Effect of Agreement with respect to private remedies: No person other than the United States—(1) shall have any cause of action or defense under the Agreement or by virtue of congressional approval thereof; or (2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with the Agreement.”).
381 For example, in Chile, international agreements are negotiated, signed, and ratified by the President. They must be approved by the Parliament, in the same manner as a new law. Once ratified and published in the official journal, an international trade agreement is the law of the land. Since it has the same status as a domestic law, and is subsequent, the promulgation of the international agreement automatically repeals any prior inconsistent law. This was the approach used with regard both to the Marrakesh Agreements and the U.S.-Chile Free Trade Agreement. Thus, the WTO agreements were promulgated in Chile, in a simple decree which listed the Marrakesh Agreement and the subsidiary international trade agreements, noted that the agreements had been approved by the Chilean Parliament on November 24, 1994, confirmed that Chile had deposited its instrument of ratification with the WTO on December 28, 1994, and stated that those
trade agreements are automatically the law of the land, they could be the basis of private citizen actions charging the government with failing to implement properly the agreements, unless there is some provision in the Agreement barring such legal actions.382

Finally, CAFTA-DR, like NAFTA, makes some modest effort to encourage alternative dispute settlement, including arbitration, among private citizens and entities. CAFTA-DR, in language similar to that in NAFTA, states:

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.383

Compliance with paragraph 2 requires only that each of the Parties be a party to the U.N. Convention on Enforcement of Foreign Arbitral Awards, and the Inter-American Convention on International Commercial Arbitration. All CAFTA-DR Parties are parties to these two conventions.384

In both agreements, there is also provision for establishing an “Advisory Committee on Private Disputes,” to “report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use, and effectiveness of arbitra-

382 This “monist” approach also explains the U.S. practice of implementing the CAFTA-DR on a sequential basis, allowing it to enter into force for the United States and the other Parties only once the other Parties have enacted the necessary implementing legislation, notwithstanding the fact that under the law of the Parties the provisions of the Agreement are automatically applicable within their territories to private citizens, government agencies and the courts. See generally CAFTA-DR, supra note 3.

383 See NAFTA, supra note 30, art. 2022; CAFTA-DR, supra note 3, ch. 20, art. 20.22.

tion and other procedures for the resolution of such disputes in the free trade area” and as considered appropriate, provide technical co-
operation.” There is, however, an important difference in the wording between NAFTA and CAFTA-DR. In NAFTA, the Commission “shall establish” the Advisory Commission, while CAFTA-DR states that the Commission “may establish” it. Thus, the likelihood that there will be such a committee under CAFTA-DR is by no means certain.

The “2022 Committee” under NAFTA has been something of a disappointment, as its funding is very limited. (Private sector members pay their own travel costs and per diem, and there appears to be funding only for the drafting of reports.) The Committee meets on an annual basis, and in recent years, efforts have been made to provide information on alternative dispute resolution through a section of the NAFTA Secretariat’s website. It is difficult to believe that a similar committee under CAFTA-DR, even if established, will be very active in the absence of significant funding, but it may be unreasonable to expect governments to support private sector arbitration beyond ensuring that the necessary agreements for enforcement are in place. In retrospect, it is unfortunate that CAFTA-DR does not require member governments to enact legislation that would facilitate the use of alternative dispute resolution within their jurisdictions, particularly with regard to adopting or improving national legislation recognizing arbitrations held within their territories, and limiting the extent that local courts may review such arbitral determinations.

Conclusion

The provisions of CAFTA-DR relating to investment disputes and those among the CAFTA-DR Parties closely follow those applicable for thirteen years under NAFTA, but with some significant departures. Among the most important innovations in Chapter 10 are changes in the investment protection provisions, which appear designed to limit the scope of “fair and equitable treatment,” customary international law, and indirect expropriation when applied to regulatory takings, along with transparency mechanisms that were added to NAFTA only gradually and after the fact. With regard to government-to-government

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385 CAFTA-DR, supra note 3, ch. 20, arts. 20.22.4–5; see also NAFTA, supra note 30, art. 2022.4 (with nearly identical language).

disputes, in addition to greater transparency of the process and the possibility of monetary penalties for non-compliance instead of trade sanctions, the major innovation relates to coverage, albeit circumscribed, of actions in which it is charged that a Party is failing to enforce its own labor or environmental laws.

Frequency of usage is always difficult to predict. If CAFTA-DR is successful in stimulating U.S. investment in the territories of the other six Parties, it is almost inevitable that there will be some, perhaps many, investor-state disputes. The first notice of intent to submit a claim under Chapter 10 of CAFTA-DR was filed in March 2007 by a U.S. firm, Railroad Development Corporation, against the Government of Guatemala. The second is apparently to be on behalf of DR Energy Holdings, Inc., an electric power producer, against the Dominican Republic. Whether the Chapter 10 provisions will be used in investor disputes among the other six Parties is more problematic, although there is some indication that the use of investor-state dispute settlement is increasing among developing nations. Chapter 20—government-to-government disputes—likely will be used only sparingly, at least at first. Many of the trade disputes arising among the CAFTA-DR Parties are likely to be subject to WTO jurisdiction, as in the conflict between Honduras and the Dominican Republic over cigarettes, even if the Parties would now have the option of choosing CAFTA-DR Chapter 20. If NAFTA provides any basis for predictions, CAFTA-DR Parties will prefer WTO dispute settlement unless the CAFTA-DR Parties move expeditiously to create the standing roster that will enable prompt formation of panels. One can also hope and expect that the U.S. government will use diplomacy and gentle


388 See, e.g., ICSID, Bilateral Investment Treaties: 1959–1996, http://www.worldbank.org/icsid/treaties/treaties.htm (last visited May 5, 2007). As of 1996, El Salvador has BITs with Argentina, Ecuador and Peru, and Guatemala with Chile; all of the developing country CAFTA-DR Parties also have various BITs with developed countries. Others have undoubtedly been concluded in the past decade. Id.


390 CAFTA-DR Article 3.2 effectively incorporates GATT Article III by reference, and CAFTA-DR Article 21.1 incorporates GATT Article 20. CAFTA-DR, supra note 3, ch. 3, art. 3.2.
pressures in situations where the other Parties are failing to comply immediately and strictly with their obligations under the Agreement.\textsuperscript{391} As with courts and other types of dispute settlement mechanisms, the measure of their success is not only the number of cases submitted to court or arbitration, but also the number of cases which were settled amicably because the formal mechanism existed.

\textsuperscript{391} With regard to China, which became a WTO Member in December 2001, the United States has refrained generally from resorting to formal WTO dispute resolution until very recently. The first request for consultations was in 2006. See China–Measures Affecting Imports of Auto Parts, WT/DS340, Mar. 30, 2006; see also WTO, Update of WTO Dispute Settlement Cases, WT/DS/OV/27 (June 9, 2006), available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/OV27-00.doc (last visited Mar. 22, 2007).
CLIMATE CHANGE AND TAX POLICY

Christina K. Harper*

Abstract: Scientific evidence suggests that man-made greenhouse gas (GHG) emissions, especially carbon dioxide emissions, are a contributing factor to global climate change. This global climate change negatively impacts our Earth and policymakers must implement climate change policies in an effort to decrease carbon emission and mitigate its negative impacts. This Article will analyze three options for regulating GHG emissions: traditional command-and-control regulation, tradable permit markets, and taxes. Following a detailed analysis of both the theoretical and practical arguments regarding carbon taxation and alternative emissions permit trading schemes, this Article concludes that carbon taxation is the superior method of reducing carbon emissions.

Introduction

From the human perspective, global climate change will have net negative impacts.¹ As such, policymakers must implement climate change policies to mitigate these impacts to our Earth. Environmental or green taxation is one tool available to policymakers. Tax has the effect of encouraging a broad range of entities, through price incentives, to take measures to reduce greenhouse gases (GHGs). The ratification of the Kyoto Protocol in 2005, which imposes specific limits on GHG emissions for thirty-six nations, has reinvigorated the dialogue about green taxation.

Countries with previously little or no green taxation in their national systems now look to the examples of Nordic nations, which have used taxation to curb pollution for decades. Countries committed to GHG reduction should also look to politically favorable emissions trading schemes, such as those developed in the United States, and to other similar mechanisms available, to help meet Kyoto goals. Nevertheless, policy makers should not discount taxation on GHGs, especially on carbon dioxide, as a viable option.

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¹ DIRK T.G. RÜBBELKE, INTERNATIONAL CLIMATE POLICY TO COMBAT GLOBAL WARMING: AN ANALYSIS OF THE ANCILLARY BENEFITS OF REDUCING CARBON EMISSIONS 7 (2002).
After discussing global climate change and the international response to climate change, this Article will analyze three options for regulating GHG emissions: traditional command-and-control (CAC) regulation, tradable permit markets, and taxes. The Article will then offer a detailed analysis of both the theoretical and practical arguments for and against carbon taxation and alternative emissions permit trading schemes. Based on this analysis, the author concludes that carbon taxation is the superior method of carbon abatement.

I. Global Climate Change

A. Defining Global Warming, the Greenhouse Gas Effect, and Climate Change

In 1898, the Swedish Nobel Prize winning chemist Svante Arrhenius first warned the world that carbon dioxide emissions could lead to a phenomenon called global warming. Today, the majority of scientists now believe global warming is not just a threat, but a reality. Global warming describes the theory that man-made increases in carbon dioxide and other GHGs have rapidly accelerated the “greenhouse gas effect,” resulting in the Earth’s surface warming at unnatural rates.

GHGs trap heat in the Earth’s atmosphere. This greenhouse effect is essential to keeping the Earth’s surface warmer; a natural phenomenon, it keeps the Earth’s surface 40°C warmer than it would be without the greenhouse effect. At its natural rate the greenhouse effect is vital to life, however, the Earth’s positive imbalance between GHG emissions and absorption through natural processes (e.g. photosynthesis) results in the continuing increase of GHGs in the atmosphere. Therefore, the greenhouse effect continues to strengthen and the Earth continues to warm.

Scientists warn that increasing global temperatures could have catastrophic consequences. As the U.S. National Academy of Scientists (NAS) describes, “the phrase ‘climate change’ is growing in preferred

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4 NAS, supra note 3, at 2.
use to ‘global warming’ because it helps convey that there are changes in addition to rising temperatures.” Specifically, the U.N. Intergovernmental Panel on Climate Change (IPCC) warns that “[f]uture changes in climate are expected to include additional warming, changes in precipitation patterns and amounts, sea-level rise, and changes in the frequency and intensity of some extreme events.” According to the IPCC, among those Earth systems “expected” to be impacted are “ocean circulation; sea level; the water cycle; carbon and nutrient cycles; air quality; the productivity and structure of natural ecosystems; the productivity of agricultural, grazing, and timber lands; and geographic distribution, behavior, abundance, and survival of plant and animal species, including vectors and hosts of human disease.”

Observational evidence suggests that climate change has already affected the Earth’s systems. Impacts include “changes in Arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves and the intensity of tropical cyclones.”

Scientists have been able to suggest with some certainty just how much the Earth has warmed. According to NAS, a growing body of evidence indicates “that the [Earth’s] surface temperatures have risen about 1.4°F (0.7°C) since the early twentieth century.” Most alarming, however, is the contention of NAS that over seventy percent or “about 0.9°F (0.5°C) of this increase has occurred since 1978.” The sharp blade-like rise of GHGs in the atmosphere in the past three decades is known as the “hockey stick result.”

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6 See NAS, supra note 3, at 3.
8 Id.
10 Id. at 8.
11 NAS, supra note 3, at 1.
12 Id. at 2.
B. Human Activities Raising Levels of Greenhouse Gases (GHGs)

Scientists seem to agree that the Earth’s temperature is always changing; however, for the majority, the “key question is how much of the observed warming is due to human activities.”14 Some GHGs occur naturally in the atmosphere, while others result exclusively from human activities. Hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride are among the class of GHGs generated exclusively through human industrial processes.15

In contrast, carbon dioxide (CO₂ or carbon), methane (CH₄), and nitrous oxide (N₂O) are naturally occurring GHGs, although certain human activities add to the levels of these naturally occurring gases.16 For instance, methane is emitted from “the decomposition of organic wastes in municipal solid waste landfills, and the raising of livestock” as well as during the “production and transport of coal, natural gas, and oil.”17 Similarly, nitrous oxide is emitted during agricultural activities such as raising livestock, paddy rice farming, and wetland changes, as well as during industrial activities including the combustion of solid waste and fossil fuels.18 Thus, scientists urge a move to clean renewable energies, such as wind, solar, bioenergy, and hydroelectric as a means to curbing GHG emissions.19

C. Why Carbon Dioxide Emissions are of Particular Concern

While man-made increases in methane, nitrous oxide, and other GHGs are dangerous to the Earth’s delicate balance, most scientists agree that carbon dioxide emissions are the primary concern. Carbon dioxide is released into the atmosphere through deforestation and through the burning of solid waste and fossil fuels, specifically oil, natural gas, and coal.20 While natural processes, such as plant photosynthesis, can absorb “some of the net 6.1 billion metric tons of carbon dioxide emissions produced each year (measured in carbon equivalent terms), an estimated 3.2 billion metric tons is added to the atmosphere

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14 NAS, supra note 3, at 2.
16 Id.
17 Id.
18 Id.
annually.” As a result, the Earth’s “carbon cycle” results in an enormous imbalance. Some studies suggest that concentrations of carbon dioxide have risen thirty percent since the Industrial Revolution. In the United States, for instance, energy-related carbon dioxide emissions represent eighty-two percent of total U.S. man-made GHG emissions. Thus, carbon dioxide is often referred to as the most critical GHG because of the unparalleled quantities produced by humans each year.

D. Skeptics of Climate Change

A small minority of scientists reject current climate change warnings as “alarmist.” For instance, Dr. S. Fred Singer of George Mason University argues, “[c]limate keeps changing all the time. The fact that climate changes is not in itself a threat, because, obviously, in the past human beings have adapted to all kinds of climate changes.” Dr. Singer is not alone. Other scientists express similar views that natural climate variability is not currently well understood, and that this variability may be greater than once thought. As such, the minority caution that “[t]emperature extrapolations of the past are not precise enough to make dire conclusions about ‘normal’ warming.”

The minority have also dismissed computer models used by the United Nations and other organizations as “oversimplifications that cannot simulate the complexities of the real climate.” For instance, a group of U.K. and U.S. scientists published a report in 2002 concluding that “[t]he IPCC simulation of surface temperature appears to be more a fortuitous case of curve fitting than a demonstration of human influence on the global climate.” Similarly, Canadians Stephen

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21 EIA, supra note 5.
22 Id. (explaining that carbon cycle is natural collective processes by which concentrations of carbon dioxide in atmosphere are regulated).
24 EIA, supra note 5.
25 Coren, supra note 23.
27 Coren, supra note 23.
28 Id. See generally Marcel Leroux, Global Warming—Myth or Reality?: The Erring Ways of Climatology (2005); Michael L. Parsons, Global Warming: The Truth Behind the Myth (1995).
29 Coren, supra note 23.
McIntyre and Ross McKitrick published a scientific study suggesting mathematical errors in the hockey stick result.31 Finally, some scientists believe the media and certain politicians promulgate unnecessary fears of dire global consequences.32

II. INTERNATIONAL RESPONSE TO CLIMATE CHANGE

A. 1980s and 1990s Intergovernmental Conventions on Climate Change

The United Nations reacted to the growing scientific evidence of the harmful effects of GHGs by forming the IPCC in 1988. However, IPCC’s purpose was limited. The Panel was charged only with collecting further data on the implications of climate change. It was three years later, with the formation of the U.N. Framework Convention on Climate Change (UNFCCC or Rio Convention on Climate Change), that real progress began.33 The aim of the UNFCCC was to establish an actual process for responding to climate change over the next several decades. Along with devising more precise measures for collecting data, industrial nations agreed to “promote the transfer of funding and technology to help developing countries respond to climate change.”34 In total, 186 countries ratified the convention, all agreeing to “mitigate” GHG emissions.35

Countries also agreed that their plans for tackling GHGs would incorporate “principles of ‘common but differentiated responsibilities’ according to economic and political situations.”36 As such, of the signatories, just twenty-four industrial nations specifically committed to take measures to ensure their GHG emissions in 2000 would not exceed their 1990 levels.37 Though the UNFCCC was characterized as

32 Coren, supra note 23 (Richard Lindzen, a respected meteorologist from the Massachusetts Institute of Technology, notes that “scientists make meaningless or ambiguous statements. Advocates and media translate statements into alarmist declarations. Politicians respond to alarm by feeding scientists more money.”).
36 Id.
37 Id.
“a legally non-binding voluntary pledge to reduce GHG emissions,” those industrial nations that later signed the Kyoto Protocol transformed their voluntary pledges into legally binding obligations.99

B. The Kyoto Protocol

1. History and Aims of the Kyoto Protocol

In 1997, world leaders assembled in Kyoto, Japan to address climate change. Led by the United Nations, these world leaders created the Kyoto Protocol to the UNFCCC. The Kyoto Protocol is an international agreement specifically designed to reduce the total GHG emissions of both developed countries and countries “undergoing the process of transition to a market economy.”40 The Protocol sets targets for reducing the levels of six GHGs for the period from 2008 to 2012 (the first commitment period).41 While specific country targets vary, on average these nations pledged to cut their GHG emissions by 5.2 percent.42

Under the rules negotiated in Kyoto, the Protocol did not become legally binding until ratified by countries representing fifty-five percent of the world’s GHG emissions. Many commentators believed that the signature of the United States, a nation responsible for roughly twenty-five percent of the world’s GHG emissions, was crucial to bring the Kyoto Protocol into force.43 The Bush Administration refused to ratify the Protocol and its future looked bleak.

Russia’s crucial decision to ratify the Protocol in November 2004 brought the emission representation total up to sixty-one percent, and the Protocol came into force on February 16, 2005.44 To date, 141 countries have pledged to reduce their GHG emissions under the

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38 INSTRUMENTS FOR CLIMATE POLICY 1 (Johan Albrecht ed., 2002).
44 Kyoto Protocol Comes into Force, supra note 42.
Protocol, and of those countries, thirty-six developed countries and transitional economies are legally bound to do so. While the Protocol sets limits on the emissions of those thirty-six nations, it does not impose specific mechanisms for meeting them.

2. U.S. Federal Resistance to the Kyoto Protocol

According to some figures, the United States has “just six percent of the world’s total population yet produces a quarter of the globe’s carbon dioxide,” making the United States the largest carbon dioxide producer in the world. U.S. rejection of the Kyoto Protocol garnered enormous amounts of criticism. In the Bush Administration’s defense, the United States produces huge volumes of carbon dioxide not only because it has the highest material wealth (both total and per capita), but because it also “suffers from a relatively extreme continental climate,” a point many Europeans forget. U.S. residents use enormous amounts of energy to air condition the nation’s desert summers and heat the Midwest winters. The U.S. also loves its automobiles. Gasoline is relatively cheap (at least from a European perspective) and public transportation is severely lacking in most parts of the United States.

With the U.S. dependency on fossil fuels at the forefront, President Bush rejected the Kyoto Protocol on two grounds:

I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate’s vote, 95-0, shows that there is clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.

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45 Ganga & Armitage, supra note 43, at 74 (“Only four of the original 34 industrialised nations to sign up to the Protocol have refused to take part: the United States, Australia, Liechtenstein and Monaco.”).
46 Id.
47 CNN (Mar. 9), supra note 31.
49 Letter from George W. Bush, U.S. President, to Senators Hegel, Helms, Craig, and Roberts, U.S. Senators (Mar. 13, 2001), available at http://www.whitehouse.gov/news/releases/2001/03/20010314.html [hereinafter Letter to Senators]. Australia also refused to ratify Kyoto. While Australia only accounts for 1.4 percent of global GHG emissions, it has the third highest greenhouse pollution per capita in the world. Australia has cited similar reasons as the United States for its decision not to ratify. Australia has, however, set its own target of an eight percent increase in GHG emissions by 2012, which the Australian
President Bush (and ninety-five U.S. Senators) rejected the Kyoto Protocol in part because the agreement initially excluded the U.S.’s global competitors, namely China and India. The irony is almost deafening. The United States produces on a per capita and aggregate basis vastly more carbon dioxide than the developing nations of the world, including China and India. For instance, in 2001 the United States generated 20 tons of carbon dioxide per capita, while China generated 2.4 tons per capita, and India 0.9 tons per capita. Yet U.S. Government officials walked away from the Kyoto Protocol pointing their fingers at China and India. Professor Stephen H. Schneider of Stanford University further explains the fallacy of the President’s position:

We have to begin allowing the developing world to leapfrog past the Victorian Industrial Revolution to new technologies. And that’s going to involve having them in the game. But they’re not even going to listen unless we have ten years to show them that we’re serious, by taking the first step. And how can somebody who created 80 percent of the problem not be responsible for taking the first step?

President Bush also based his rejection of the Kyoto Protocol on the belief that mandatory emissions cuts were a serious threat to the

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50 In late June 1997, President Clinton addressed a special session of the United Nations in New York and urged the world community to consider economic strategies for reducing greenhouse gas emissions. The RFF Reader in Environmental and Resource Policy 205 (Wallace E. Oates ed., 2d ed. 2006) [hereinafter RFF]. The following month the U.S. Senate passed a resolution 95-0 warning the president not to agree to any treaty at the upcoming Kyoto conference that would hurt the U.S. economy or fail to commit the large developing nations to similar action. Id. at 206. President Clinton signed the Kyoto Protocol in 1998, but it was a “gesture of support with little legal significance.” Id. at 207; see also U.S. Signs Global Warming Treaty, CNN.com, Nov. 12, 1998, http://www.cnn.com/TECH/science/9811/12/climate.singing/index.html. The President never submitted the treaty to the Senate for ratification. RFF, supra note 50, at 207. However, in the last few years some members of Congress have proposed alternative measures for dealing with climate change. For example, Senator John McCain (R-AZ) has joined with Senator Joe Lieberman (D-CT) in sponsoring the Climate Stewardship Act. “The bill would require mandatory reductions in greenhouse gas emissions from the electricity generation, transportation, industrial, and commercial sectors of the economy, which represent 85% of overall US greenhouse gas emissions.” Brad Knickerbocker, Kyoto Era Begins, USA TODAY, Feb. 15, 2005, http://www.usatoday.com/news/world/2005-02-15-kyoto-csm_x.htm.


52 Id. at 202.

U.S. economy.\footnote{President Bush stated, “The Kyoto treaty would have wrecked our economy, if I can be blunt.” 
\textit{Bush Rejects Kyoto-style G8 Agreement, BBC News, July 4, 2005, http://news.bbc.co.uk/2/hi/americas/4647383.stm.}} Mandatory emissions cuts could negatively affect some U.S. industries at the outset of compliance with the Protocol. Fred Palmer, President of Western Fuels Association, Inc., called the issue of global warming “a game-ending kind of issue for the American coal-fired electricity industry.”\footnote{Frontline, \textit{What’s Up with the Weather? Interview: Fred Palmer}, April 2006, http://www.pbs.org/wgbh/warming/debate/palmer.html. Mr. Palmer argued that the coal industry would be first in the firing line, ahead of oil and gas, in mandatory carbon emission cuts, stating that “[t]he carbon content of the fuel, of the fossil fuel, determines the amount of carbon dioxide that is created in a combustion process. And coal is the most carbon-rich in terms of the content of the fuel, and it’s 60 to 65 percent carbon. So compared with natural gas, that’s down in the 30 to 35 percent range, I believe.” \textit{Id.}} This type of rhetoric from industry crippled the chances of the Protocol succeeding on Capital Hill.

Nevertheless, the United States must make changes in how it does business as usual and it must make well-informed policy choices in dealing with GHGs. Many believe that the Kyoto Protocol would have been a step in the right direction. Initially, experts urged the United States to commit to reducing GHG emissions by thirty-three percent. President Clinton agreed to a seven percent reduction, a commitment higher than the European average commitment. The Bush Administration actually received everything it asked for during the Kyoto negotiations, namely the ability to use carbon sinks and cap and trade programs to reduce GHGs.\footnote{Patrick Parenteau, \textit{Anything Industry Wants: Environmental Policy Under Bush II}, 14 DUKE ENVTL. L. & POL’Y F. 363, 365 (2004).} Indeed, Kyoto provided the United States with a broad range of policy tools to curb GHG emissions.\footnote{Kyoto Protocol, \textit{supra} note 40, art. 2. The U.S. introduced trading emissions to negotiations at Kyoto based on the U.S.’s success with the Clean Air Act. RFF, \textit{supra} note 50, at 207.}

The United States has, for the time being, abandoned the international community in the growing fight against climate change. As one scholar put it, “[w]hereas the U.S. provided political leadership at crucial junctures in the creation and evolution of the ozone regime, it has emerged as one of the most important opponents of drastic international action to combat GHGs.”\footnote{The Environment, \textit{International Relations and US Foreign Policy} 166 (Paul G. Harris ed., 2001).} Yet even without the Kyoto Protocol, the United States must reduce its dependence on fossil fuels, especially coal.

For instance, the United States could utilize non-polluting energy sources as its northern neighbor has done. Canada generates much of
its electricity through hydroelectricity, which experts say is one reason Canada (also plagued by severe winters) emits much lower carbon dioxide amounts than the United States.\footnote{NEF, \textit{supra} note 48.} In fact, hydroelectricity powers much of the U.S. Pacific Coast.\footnote{What’s Up with the Weather? Interview: Stephen H. Schneider, \textit{supra} note 54 (noting that on the East Coast of the United States, electricity is mainly derived through oil, gas, and nuclear power; coal accounts for about fifty-six percent of overall electricity in the United States).} The United States could also use other non-polluting sources of energy, including biomass, wind, and solar energy. The problem is making these technologies as efficient as burning fossil fuels.

Some scholars believe that the United States is already on its way to cleaning up industry. David Gardiner, former Executive Director of the White House Climate Change Task Force (under President Clinton), argued in 2000: “[I]n the USA we’ve broken a cycle dating back to the Industrial Revolution, a cycle in which economic growth inevitably leads to more pollution.”\footnote{Instruments for Climate Policy, \textit{supra} note 38, at 22.} According to some figures, during the 1990s, the U.S. economy “grew almost three-times faster than energy-related carbon dioxide emissions.”\footnote{Id.} Slowing the \textit{rise} in carbon dioxide emissions may be a start, but it is not enough.

\textbf{C. Use of Green Taxation in Response to the Conventions}

In 1997, heeding the warning of climate change, the Organization for Economic Co-operation and Development (OECD) began investigating a uniform carbon dioxide or energy tax for all OECD countries.\footnote{Ruud A. de Mooij, \textit{Environmental Taxation and the Double Dividend} 1 (2000).} The OECD produced a number of working papers under the project entitled “Policies and Measures for Possible Common Action,”\footnote{OECD, Climate Change, Energy and Transport, http://www.oecd.org/document/36/0,2340,en_2649_34359_2346468_1_1_1_1,00.html (last visited Feb. 21, 2007) [hereinafter OECD 1997].} but the project generally produced more questions than answers and failed to produce a serious proposal for a uniform OECD carbon or energy tax.\footnote{See generally, e.g., Richard Baron, \textit{Economic/Fiscal Instruments: Taxation (i.e., Carbon/Energy)} (OECD Working Paper No. 4, 1997), \textit{available at} http://www.oecd.org/dataoecd/36/50/2392474.pdf; Richard Baron, \textit{Economic/Fiscal Instruments: Competitiveness Issues Related to Carbon/Energy Taxation} (OECD Working Paper No. 14, 1997).}
response to climate change concerns. However, European Union (EU) countries have failed to agree even on the need for such an EU-imposed tax, much less a full strategy for implementation.\textsuperscript{66} Nevertheless, several EU countries have implemented national carbon taxes, including Denmark, Finland, Sweden, and the Netherlands.

III. TAX POLICY AND THE ENVIRONMENT

A. Options for Environmental Regulation of GHG Emissions

1. Traditional Command-and-Control Regulation

Under traditional command-and-control (CAC) regulation, polluters are required to comply with specified standards (the command) and the regulatory authority conducts stringent monitoring and enforcement (the control).\textsuperscript{67} CAC regulation ensures that firms curb polluting practices. Moreover, CAC regulation is source specific, meaning it requires every firm under its scope to reduce emissions.

While many countries have had some form of CAC over the past few decades (especially with regard to air and water pollution), many policymakers believe this approach is inflexible and inhibits innovative development by placing all the decision-making power in the hands of bureaucratic regulators.\textsuperscript{68} CAC regulation is also costly to administer because of the need for close monitoring.

2. Economic Incentives

Economic incentives (EIs), on the other hand, have become increasingly popular around the globe. The Environmental Protection Agency (EPA) has adopted a broad definition of EIs as “any instrument that provides continuous inducements, financial or otherwise, to encourage responsible parties to reduce their release of pollutants or make their products less polluting.”\textsuperscript{69} As such, EIs include tradable


permit schemes and green taxes. EIs have a number of advantages over traditional CAC regulation in controlling GHG emissions. First, EIs encourage polluters to “reduce pollution below permitted amounts when it is relatively inexpensive to do so.” Second, EIs promote technological innovation. Polluters will be willing to spend resources on alternative energy sources, for example, when economically efficient. Third, EIs are better suited to cover a wide range of polluters, large and small, because EIs do not demand the amount of enforcement required by CAC regulation.

One form of EIs is emissions trading schemes. Under an emissions trading scheme, the environmental authority allocates to participants a certain number of permits to release emissions (or “right to pollute” coupons), which can be sold or traded among the participants. Polluters who can curb their emissions at a low cost can sell their excess permits to other participants for whom it would be very costly to reduce emissions. Emissions trading schemes are not source specific; rather the target set by the environmental authority is a total of emissions. Conceptually, the same net reduction of emissions that would be achieved through CAC regulation can be achieved through trading schemes, but at a much lower cost.

Some policymakers favor so-called grandfathered permit markets that give polluters their initial distributions of permits according to historical emissions. In other words, under a grandfathered regime, well-established businesses are favored over new industry entrants. Following the popularity of grandfathered permit markets in the United States, several similar schemes have developed across the globe.

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70 Id. Some literature uses the term “economic incentives” to encompass not only market based instruments but also liability, information disclosure, voluntary measures, and non-monetary rewards. Id. at 4–6.

71 Id. at 2.

72 Id.

73 Id. at 3.


76 EPA International Economic Incentives, supra note 69, at 6.
3. Environmental Taxation

Green taxes can also be useful tools in regulating GHG emissions. There is no generally accepted definition of an environmental tax. According to the Statistical Office of the European Communities (Eurostat), an environmental or green tax is: “A tax whose tax base is a physical unit (or a proxy of it) of something that has a proven, specific negative impact on the environment.” According to this definition, the tax base determines whether the tax is an environmental tax. Understandably, Eurostat has chosen a pragmatic definition. The motivation behind implementing a tax can be difficult to quantify, and thus Eurostat, being in the business of statistical analysis, looks simply at what is being taxed.

In contrast, the OECD has used the following definition:

Full coverage of the use of fiscal instruments in environmental policy will . . . need to consider both:

(i) Taxes which have been introduced to achieve a specific environmental objective, and which have been explicitly identified as “environmental taxes.”

(ii) Taxes which are introduced initially for non-environmental reasons, but which impact on environmental objectives, and which may be increased, modified or reduced for environmental reasons.

This Article focuses on taxes in category (i), taxes motivated by environmental concern. Though outside the scope of this Article, policymakers, when making difficult policy choices regarding climate change, should also consider category (ii) taxes, those taxes that have accidentally had positive environmental affects.

Like permit trading schemes, taxes are economic incentives designed to change behavior. Green taxes encourage a broad range of entities to take environmentally friendly measures through price incentives. In contrast to permit schemes, policymakers can use taxes to raise public revenue. For instance, the U.K. Office of National Statistics reports that environmental taxes raised thirty-two billion pounds in 2001 (approximately forty-six billion dollars). Large figures such

77 National Statistical Offices in Norway, Sweden, Finland & Denmark, Energy Taxes in the Nordic Countries—does the polluter pay? 1, 6 (2003) [hereinafter Energy Taxes in Nordic Countries].
79 Bayley, supra note 67, at 2.
as this almost certainly do not include the administrative costs of implementing green taxes and will often include taxes not motivated by environmental concerns (e.g. transport taxes).

Carbon taxes are excise taxes based on the carbon content of fuel, requiring the payment of a fixed fee for every ton of carbon emitted.\textsuperscript{80} The basic economic premise behind carbon taxation is straightforward: market prices for carbon-based fuels such as oil, coal, and gas do not reflect the full environmental costs of their production and consumption and, therefore, the price of these fuels should be raised to account for these negative externalities. Raising the price of carbon-content fuel relative to cleaner burning fuel will encourage some consumers to decrease their use of carbon-content fuel. Policymakers thus guide consumers where Adam Smith’s “invisible hand” failed. Implementing such a tax, however, is not as straightforward.

B. \textit{Supporters of These Emissions Regulation Options}

1. Private Industry

In his book, \textit{Public Choice and Environmental Regulation}, Gert Tinggaard Svendsen of the Aarhus School of Business in Denmark discusses the general attitude of private industry, state government, heavily regulated industry, and environmental groups toward the options for emissions regulation.\textsuperscript{81} Svendsen reports that private industry generally supports permit markets.\textsuperscript{82} Permit trading schemes are more flexible than CAC regulation, which does “not readily adapt to changing economic conditions, and therefore, does not embrace new technological solutions.”\textsuperscript{83} Green taxes are rigid and may be arbitrarily set, while permit markets allow the market to set prices. Moreover, private industry particularly supports grandfathering schemes that effectively make it more difficult for future competitors to enter the industry.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{80} RFF, \textit{supra} note 50, at 226.
\item \textsuperscript{81} \textit{See generally Svendsen, supra} note 76.
\item \textsuperscript{82} \textit{Id.} at 26.
\item \textsuperscript{84} Svendsen, \textit{supra} note 75, at 36.
\end{itemize}
2. State Government

Svendsen argues that state governments prefer green taxes because of the ability to maximize tax revenues. Nordic green taxes in the 1990s taught policymakers that it can be difficult to net substantial revenues through green taxation. Governments should consider the ability for even relatively small amounts of revenue to self-sustain further environmental projects. In other words, revenue from green taxes can be recycled back into projects that further environmental protection.

The political success of trading permit schemes should not be overlooked. The environmental success of trading schemes in the United States has encouraged several other governments to choose permit trading over green taxation. For many governments, green taxation is an uphill battle against the powerful forces of industry, a battle potentially not worth fighting.

3. Heavily Regulated Industry

Svendsen contends that heavily regulated industry, for example public utilities, will generally follow the state’s interest and chose green taxation or CAC regulation; in return, regulated industry can maintain their monopoly. It seems plausible that regulated industry would follow the interests of government, because such entities are essentially an extension of government. However, for the reasons outlined above, governments may instead choose permit schemes. Heavily regulated industry will lobby for exemption from whatever form of regulation is implemented, and are often successful.

4. Environmental Groups

Svendsen reasons that environmental groups will chose to cooperate with industry out of self-interest. He argues that members of environmental groups must pay membership fees, paying members want results, and the best way for the organization to provide results is by cooperating with industry and lobbying for permit trading schemes. This proposition seems overly cynical, and based on more recent research, unsubstantiated. Sierra Club, the environmental group Svend-

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85 Id. at 40.
86 See discussion infra Part IV.D.2.e (the case of Japan).
87 SVENDSEN, supra note 75, at 35.
88 See discussion infra Part IV.D.2.c (the case of Norway).
sen uses as an example, supports a wide range of policy tools.\textsuperscript{89} For example, the Sierra Club supports U.S. federal regulation requiring automakers to use modern fuel-saving technology, a type of CAC regulation.\textsuperscript{90}

Moreover, the Sierra Club opposes emissions trading schemes because of resulting “hotspots.”\textsuperscript{91} In essence, because most emissions trading schemes do not put a CAC-type limit on the amount of pollution allowed from a particular source (i.e. polluters can purchase an unlimited number of permits), areas around these remaining high polluters become hotspots. The Sierra Club opposes the EPA’s proposed mercury trading scheme under the Clean Air Act because “dirty plants could continue to emit high levels of mercury beyond 2018 and create mercury ‘hotspots’ by simply purchasing mercury pollution credits from cleaner plants.”\textsuperscript{92}

Traditional CAC regulation is source specific, requiring each polluter to reduce GHG emissions. Green taxation and emissions trading schemes, on the other hand, provide economic incentives for polluters to reduce emissions but do not demand that each polluter reduce emissions. Instead, these EIs focus on total reduction of emissions and as such allow industry greater flexibility in compliance.

IV. ENVIRONMENTAL (GREEN) TAXATION

A. What Can Green Taxation Achieve?

Green taxes may be used to punish polluters. The general principle of increasing taxes on “bads” (e.g. polluting, smoking) and decreasing taxes on “goods” (e.g. labor)\textsuperscript{93} was first adopted by the OECD in
Environmental agencies across the globe use this underlying principle as a reason for implementing green taxes. Countries including Sweden, Norway, Finland, Denmark, and the Netherlands have attempted to shift the tax burden of labor and capital to the use of environmental resources through the implementation of green taxes. Green taxes are also often designed to change behavior. Taxes must be set high enough to “make it attractive for customers to use more environmentally benign products and practices.” For example, in 1989 the U.S. Congress introduced a federal tax on Ozone Depleting Chemicals. Initially the tax on chlorofluorocarbons (CFCs) was $1.37 per pound, approximately twice the then-current product price. By 1995, the federal tax was $3.10 per pound. The Federal Government simultaneously introduced the Clean Air Act, which put a cap on most CFCs with a phase-out in 2000. Nevertheless, many analysts believe that the tax, not the cap, is responsible for U.S. ozone gas reduction.

Similarly, policymakers can use green taxes to channel good behavior and influence the choice of resources used. For example, governments may want to discourage the use of exhaustible natural resources and provide more attractive alternatives through the use of the tax system. Governments may also use green taxes to generate revenue. Governments may choose to use the resulting revenue to pay for damages created from past pollution or for measures to reduce future pollution. For example, of the thirty-two billion pounds generated by U.K. environmental taxes in 2001, fourteen percent purportedly was allocated to environmental projects.

Tax shifting describes the economic theory that by combining a significant pollution tax with a major restructuring of the national tax system, government can make the overall economy more efficient.

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94 Fauchald, supra note 78, at 15.
95 News Release, Royal Comm’n on Envir. Pollution, Climate Change Tax Should Relate Directly to Carbon Dioxide Emissions (June 10, 1999), available at http://www.rccep.org.uk/news/99-2.htm [hereinafter Royal Comm’n News Release] (Sir Tom Blundell, Chairman of Royal Commission, states in a letter, “the Royal Commission on Environmental Pollution strongly supports [the] intent to use the tax system to deliver environmental objectives, so achieving a shift in the overall tax burden from ‘goods’ to ‘bads’.”).
96 EPA INTERNATIONAL ECONOMIC INCENTIVES, supra note 69, at 55.
98 Id.
99 Id.
100 Id.
101 Fauchald, supra note 78, at 32.
102 Bayley, supra note 67, at 2.
This theory often arises in conjunction with raising revenue. In the early 1990s, many scholars suggested that governments could eradicate unemployment by implementing high environmental taxes. The debate was most vigorous in European countries with strong environmental political parties and high unemployment.103

B. At What Stage Should Green Taxation Be Applied?

1. Direct Tax on Emissions

Environmental taxes may be applied directly or indirectly to GHGs.104 Taxing greenhouse emissions is a form of direct tax. When a country seeks to reduce or curb GHG emissions, it seems reasonable to directly tax emissions, and thus provide an immediate price incentive to stop polluting. However, calculating the amount a polluter emits can be difficult and/or costly.105 Thus, direct emissions taxes may be useful when there are few large polluters and, as such, calculation of emissions is feasible.106 Policymakers may also choose an emissions tax when there is no correspondence between input or final products and emissions, the alternative form of tax.107 For instance, there is generally “full correspondence between characteristics of raw materials and emissions of CO₂,” but “little correspondence in relation to emissions of NO₂.”108

2. Indirect Tax on Inputs or Final Products

Alternatively, in order to curb GHG emissions, policymakers may choose to apply an indirect tax on inputs or final products. Historically, OECD countries have chosen this form of indirect tax, rather than tax emissions directly.109 Ole Fauchald suggests that one reason countries have chosen the indirect tax route is their aim to establish neutral tax systems in relation to the behavior of consumers and producers.110 Fauchald argues that such an approach “does not seem appropriate” because the objective of environmental taxes is “precisely to affect the choices of producers and consumers for the benefit of

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103 Morris, supra note 97.
104 See Fauchald, supra note 78, at 30–1.
105 Id. at 32.
106 Id.
107 Id.
108 Id. at 32.
109 Fauchald, supra note 78, at 33.
110 Id.
the environment.” While there is evidence that countries seek neutrality (or at least the appearance of neutrality), the primary choice of the indirect tax over the direct emissions tax is probably the relative ease to which it can be implemented.

C. Limits to Green Taxation

1. Death of the Double Dividend Hypothesis?

In the early 1990s, Dutch and Northern European scholars produced a large volume of literature proclaiming the merits of environmental taxes. This literature included a number of economic models suggesting that environmental taxes could be used to raise significant public revenue. One such model, the “double dividend hypothesis,” envisaged a two-fold return from environmental taxation. The first return, or dividend, was the increase in environmental quality. The second dividend was the reduction of other taxes, namely the ability to shift the burden of taxation away from labor and toward the environment in order to boost employment or public welfare.

Currently, most policymakers believe that the second dividend is unrealistic. The green tax, like any other tax, exacerbates the inefficiencies of the existing tax system. Much of the early double dividend literature previously ignored this negative “tax interaction ef-

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111 Id.
113 See generally OECD Assessment, supra note 112.
114 See generally Pearce, supra note 112.
115 See id.
118 Id. at 537.
fect,” focusing only on the good aspects of carbon taxes—the reduction of carbon emissions and the ability to raise revenue that could be used to reduce existing taxes and their inefficiencies (“revenue recycling effect”). However, most economists now agree that “the tax interaction effect does exist and may actually be as large as—or even larger than—the revenue recycling effect, so the double dividend argument has pretty much been ruled out.” For this reason, the first dividend—the promise of a cleaner environment—must be the driving force behind green taxes. While this may be a harder sale, the onset of the Kyoto Protocol has made countries more amenable to the possibilities of carbon and energy taxes. Although taxes may not be set high enough to eradicate unemployment, revenues from green taxes can be recycled back to at least partially offset “bad” taxes. Moreover, some of the revenues raised by green taxes may be recycled into environmental projects and research. Such a program, in essence, creates a green double dividend and makes good policy sense.

In an extreme example, some Belgian green taxes are so low it costs the government more to collect them. This fact alone does not necessarily make the tax inefficient. The persistence of such taxes signals that the Belgian Government has determined that the social benefits outweigh the administrative costs.

A minority of scholars still believe the double dividend is possible through tax shifting—a complete restructuring of the national tax system. One study by Dutch economist Ruud de Mooij claims that the double dividend could be achieved by improving terms of trade. For example, de Mooij’s model suggests that an OECD-wide energy tax would force energy demand within the OECD to fall. If such demand fell by a significant amount (de Mooij’s model suggests a fall of 1.8 percent), the price of energy on the world market would fall and improve the terms of trade for OECD countries. Finally, improvement in

119 Id.
120 Id.
121 Id.
122 See Sullivan, supra note 117, at 537.
123 Paul O’Brien et al., Encouraging Environmentally Sustainable Growth in Belgium 25 (Economics Dep’t, Working Paper No. 300, 2001), available at http://www.oecd.org/search Result/0,2665,en_33873108_33873261_1_1_1_1_1,00.html.
124 De Mooij, supra note 58, at 1.
125 Id.
126 Id.
127 Id. at 148.
terms of trade could yield a “strong” double dividend for the countries of OECD.\textsuperscript{128}

2. Political Barriers to Direct Emissions Policies

Big industry is sometimes a big problem for policymakers devoted to environmental taxes. Energy industry groups argue that environmental taxes hinder global competitiveness.\textsuperscript{129} The effectiveness of this claim is perhaps most evident in the public statements by leaders of the United States and Australia in rejecting the Kyoto Protocol.\textsuperscript{130} A survey of recent literature reveals that scholars are working to counter this fear and have suggested at least five techniques to reduce the effects from environmental taxes on competitiveness.\textsuperscript{131}

First, a country may introduce a relatively low rate of environmental tax.\textsuperscript{132} A tax that is too low, however, will not only fail to affect competitiveness, but will also fail to have substantial beneficial environmental effects. In the words of the OECD, a tax that is too low will simply be a “revenue raising device” not an environmental tax.\textsuperscript{133} Indeed, the EPA proposes that green taxes tend to be set too low to have a significant impact on the environment, with few exceptions.\textsuperscript{134}

Second, scholars suggest that countries may “exempt those industries or products that are exposed to international competition from the tax.”\textsuperscript{135} Many countries have used this technique, but this method “raises serious problems related to cost-effectiveness and the achievement of the environmental objective in question.”\textsuperscript{136} Third, countries may subsidize parts of industry subject to competitive disadvantages.\textsuperscript{137} Fourth, countries can make domestic taxes dependent on whether foreign producers competing in the same market as domestic producers are subject to similar taxes.\textsuperscript{138} Finally, countries can offset the adverse effects of environmental taxes through a mechanism called a “border

\textsuperscript{128} Id.


\textsuperscript{131} Fauchald, supra note 78, at 35.

\textsuperscript{132} See id. at 45.

\textsuperscript{133} Id. at 35.

\textsuperscript{134} See id. at 45.

\textsuperscript{135} Fauchald, supra note 78, at 35.

\textsuperscript{136} EPA INTERNATIONAL ECONOMIC INCENTIVES, supra note 69, at 3.

\textsuperscript{137} Fauchald, supra note 78, at 35.

\textsuperscript{138} Id.; see also discussion infra Part IV.D.2.c (on Norway).
For example, by applying the tax to final products rather than to raw materials, a country has greater freedom to adjust the tax as the product either enters or leaves the country.  

D. Carbon Taxes and Credits

1. Defining Carbon Taxation

Currently, carbon is regarded as the most threatening GHG. As such, several countries have implemented carbon taxes in an effort to curb the potential destruction from increasing carbon in our atmosphere.

Carbon taxes are generally revenue neutral: revenue generated is recycled back into the economy to enhance welfare, usually in an attempt to offset tax burdens in other areas or to invest in environmentally sound technology. True carbon taxes are based on the carbon content of fuel, however, some literature incorrectly sweeps general taxes on energy under the umbrella of “carbon taxes,” because such taxes are often aimed at lowering concentrations of carbon dioxide (and possibly other GHGs) in the atmosphere. Most scholars agree that general energy taxes are inferior to true carbon taxes in reducing carbon dioxide in the atmosphere.

2. Case Studies

a. European Union

The EU-15 committed collectively to reduce their 1990 greenhouse gas emission by eight percent by 2012. However, in EU Coun-

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139 Id.
140 Id.
141 See discussion infra Parts IV.D.2.b-c (on Denmark and Norway). Switzerland recently announced the introduction of a carbon tax, which will become effective in 2009. See Daniel Pruzin, Swiss Parliament OKs Carbon Tax but Delays Effective Date until 2009, DAILY TAX REPORT (BNA), Dec. 20, 2006, at G-4.
142 See discussion infra Part IV.C.1 (double dividend).
144 Id.
cil Decision 358/CE, the EU-15 separately agreed to redistribute the burden among themselves.\textsuperscript{146} For example, under the Decision, France is committed to reduce greenhouse gas emissions by zero percent.\textsuperscript{147} Germany is committed to reduce greenhouse gas emissions by twenty-one percent.\textsuperscript{148} Members outside the EU-15 made commitments ranging from six to eight percent.\textsuperscript{149} For example, Hungary and Poland committed to a six percent reduction of greenhouse gas emissions from 1990 levels.\textsuperscript{150}

EU bodies have debated the utility of a common carbon tax applied across the European Commission (EC) Community.\textsuperscript{151} Following the Rio Conference on Climate Change in 1991, the EC Community began evaluating mechanisms for reducing GHGs, particularly carbon emissions, including the concept of an EU common carbon tax. Eventually, the EC gave its approval for a fifty percent carbon content and fifty percent energy cost tax (“50/50 tax”) to be applied to all Member States.\textsuperscript{152} As the name suggests, fifty percent of the tax would be based on carbon emissions, while the other fifty percent would be imposed on energy production (including nuclear power, but excluding renewable energy sources).\textsuperscript{153}

Under this proposal, Member States would be free to allocate the revenue raised through the tax as they wished.\textsuperscript{154} The proposal was met with early resistance. Spain, Portugal, Greece, and Ireland objected to the 50/50 tax because they were at earlier stages of industrialization than other EU Members. They argued that a common EU tax would cripple any hopes of catching up to more industrialized nations like France, Germany, and the United Kingdom.\textsuperscript{155} In addition, they argued that their respective energy use was relatively lower than

\textsuperscript{146}Council Decision 358/CE, pmbl., art. 2, annex II, 2002 O.J. (L 130) 1, 2, 3, 19 (EU).
\textsuperscript{147}Id. at 19, Annex II.
\textsuperscript{148}Id.
\textsuperscript{149}Kyoto Protocol, supra note 40, Annex B.
\textsuperscript{150}Id.
\textsuperscript{151}The Mandala Projects, supra note 66.
\textsuperscript{152}Id.
\textsuperscript{154}The Mandala Projects, supra note 66.
\textsuperscript{155}Id.
other EU members and thus did not demand immediate response through a rigid tax scheme. All fifteen members of the EU, apart from the United Kingdom, eventually formed a consensus and “agreed upon the necessity of the tax on an EU level.” The United Kingdom was not entirely alone—the EC also could not agree to EU-wide implementation. Nevertheless, some European countries, such as Finland, subsequently modified their energy taxation schemes to fit the model discussed by the EC.

The idea of a common carbon tax in the European Union is not entirely dead. In 2005, the EC published an external study finding that “a common EU carbon tax would be the most cost-efficient way of reaching the EU climate policy objectives.” However, the study acknowledged that a carbon tax “would have a somewhat negative impact on competitiveness in some energy-intensive sectors” and that “[t]hese effects would be alleviated only slightly by exempting energy-intensive sectors from energy taxation.”

The EU governing bodies have also encouraged tax as a useful tool in achieving Member States’ Kyoto targets. For instance, while Directive 2003/87 establishes a scheme for emissions trading, the Directive states that “the instrument of taxation can be a national policy to limit emissions from installations temporarily excluded.” In other words, the Directive encourages the use of tax on activities not presently covered by the EU Emissions Scheme.

A majority of EU-15 members have enacted some form of carbon or energy tax (or both) as part of their plan to reduce GHG emissions. EU countries with carbon taxes include Finland, Sweden, the Nether-

156 Id.
157 Id. The United Kingdom objected to the tax “based on the principle of national sovereignty, and have proposed an internal increase on VAT on domestic power and road fuel, rather than a tax on emissions or energy.” Id.
158 Id.
159 For example, Finland imposed the first carbon dioxide tax in 1990 and modified it in 1994. The Finnish tax has two components: (1) a basic tax component to meet fiscal needs and (2) a combined energy/carbon dioxide tax component. Pakerr, supra note 153.
161 Id. The study also breathed life into the double dividend principle, stating “that Member States would benefit from common energy/carbon tax policies in the form of higher employment and welfare if they used tax revenues to reduce employers’ social security contributions.” Id.
lands, Denmark, Italy, and France.\textsuperscript{163} Other European countries have so far rejected true carbon taxes and opted for general energy taxes instead. These countries include Germany, the United Kingdom, Austria, and Belgium.

It may be helpful to view the introduction of carbon taxes across Europe in two distinct waves. The first wave of carbon taxes began in Northern Europe and the Netherlands in the early 1990s. With the exception of the Netherlands, these carbon taxes were introduced into already existing general energy tax regimes.\textsuperscript{164} Finland introduced the world’s first carbon tax in 1990.\textsuperscript{165} In 1991, Sweden followed, introducing a carbon tax and cutting existing energy taxes by fifty percent as part of a comprehensive reformation of the tax system.\textsuperscript{166} The overall effect was a significant increase in energy taxation.\textsuperscript{167} In 1992, the Netherlands introduced a fuel environmental tax with taxation basis of fifty percent for energy and fifty percent for carbon.\textsuperscript{168} Denmark introduced its own carbon tax in 1993.\textsuperscript{169}

Other EU members have only reluctantly decided on taxation as a tool for emissions reduction after facing poor Kyoto target outlooks. This second wave of countries are divided over whether to introduce general energy taxes or more specific carbon taxes. For instance, Italy

\textsuperscript{163} EPA, \textit{National Center for Environmental Economics, Economic Incentives for Pollution Control: Chapter 11.1.5.2 Energy/Carbon Taxes, available at http://yosemite.epa.gov/EE/Epalib/incent.nsf/0/0483a144da8fa434852564f7004f5e68?OpenDocument (last visited May 3, 2007)[hereinafter Pollution Control Chapter]; see also id. (follow hyperlink for Table 11-12).

\textsuperscript{164} See \textit{Jean-Philippe Barde, Environmental Taxation: Experience in OECD Countries, in Ecotaxation 223, 233 (Timothy O’Riordan ed., 1997).}


\textsuperscript{166} \textit{Barde, supra note 164, at 232.}

\textsuperscript{167} See id. at 232–33. However, in 1993 the “manufacturing industry and commercial horticulture were granted a total exemption of energy tax and a 75 percent rebate on the carbon dioxide tax,” undermining the environmental objectives. \textit{Id.}


\textsuperscript{169} See id. at 1-1a(b). However, “the tax system was reformed in 1996, and in addition to the traditional CO\textsubscript{2} [carbon dioxide] taxes, more comprehensive and new environment and energy taxes were introduced, which was composed of the establishment of CO\textsubscript{2} and energy taxes, SO\textsubscript{2} [sulfur dioxide] taxes, natural gas taxes, battery surcharge, chlorine solvent taxes and agricultural chemicals taxes and the increase of gasoline taxes.” \textit{Id.}

b. Denmark

Under the Kyoto Accord, Denmark, a wealthy, green-friendly nation, pledged to cut its 1990 GHG emissions twenty-one percent by 2012.\footnote{Kyoto Protocol, supra note 40, Annex B (allocating eight percent to EU-15); Council Decision 358/CE, supra note 146, Annex II (redistributing burden among EU Members).} Denmark’s carbon tax went into effect in 1992 for households and in 1993 for industry.\footnote{Svendsen, supra note 75, at 147; see also Danish Energy Authority, Green Taxes in Trade and Industry—Danish Experiences 3 (2005) [hereinafter Danish Energy Authority].} The tax was “levied on all fossil fuels in proportion to their carbon content” and accompanied a general energy tax and sulfur dioxide (SO\textsubscript{2}) tax.\footnote{Energy Taxes in Nordic Countries, supra note 77, at 14.} Scholars have criticized the
Danish carbon tax on three grounds. First, the tax has been criticized for being far too low. Second, the tax has been criticized because the refund system for energy-intensive firms provided little economic incentive to reduce emissions. Under the carbon tax scheme, VAT-registered firms were required to pay only half per ton of carbon emitted as were Danish households burning fossil fuels. Finally, some commentators argued that the accompanying energy tax wrongly “favoured fossil fuel-based energy production by electric utilities because it [was] levied on electricity consumption and not on fuel inputs.”

In 1996, Denmark modified its green tax system with the introduction of the aptly titled Green Tax Package. Again, the Green Tax Package included a carbon tax and a tax on energy and sulfur dioxide. This time around, however, the Government implemented a system whereby tax rates increased gradually, “thus giving companies time to improve energy efficiency.” However, little else about the carbon tax changed. Nevertheless, in 1999, the Danish Energy Authority gave the tax scheme a glowing review, claiming:

[T]he Green Tax Package has contributed significantly to the attainment of the expected targets for CO₂ emissions . . . the additional taxes on trade and industry had no noticeable consequences for the economy or competitiveness of the companies as a whole. This is mainly due to the redirection of revenue to trade and industry and tax rebates for energy-intensive enterprises.

The merit of these glowing claims is suspect in view of Denmark’s Kyoto target projections. Rather than working toward reducing levels by twenty-one percent, Denmark has so far increased emissions by 6.3 percent since 1990. One commentator quipped, “the likely gap between [Denmark’s] Kyoto commitment and its emissions levels projected for 2010 is 25.2 percentage points . . . despite all those windmills.” The likely reason that Denmark’s current green tax system

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177 See supra notes 179–82.
178 Svendsen, supra note 75, at 147.
179 Id.
180 Id.
181 Id.
182 Danish Energy Authority, supra note 175, at 3.
183 Id.
184 Id.
186 Id.
does not find much support in economic theory is that it contains high environmental taxes on consumers and, by European standards, low environmental taxes on industry.

c. Norway

Norway is not a member of the European Union, but it is a signatory to the Kyoto Protocol. Under the Protocol, Norway is actually allowed to increase emissions one percent over 1990 levels for the first commitment period (2008-2012).¹⁸⁷ As a wealthy nation, some scholars argue that it can easily “afford” environmental protection, a contention supported by the fact that Norway has had some form of environmental taxes since the 1970s.¹⁸⁸

Norway introduced a carbon tax in 1991. At that time, however, a general tax on energy was already in place.¹⁸⁹ There was not a large-scale tax system reformation because of the carbon tax, but there was a simultaneous decrease of the income tax.¹⁹⁰ A 2004 report by the OECD noted that Norway has “one of the highest OECD levels of carbon taxes,” signaling “a willingness by Norwegian society to sacrifice near-term interests for the greater good.”¹⁹¹ However, the report also stated that the effectiveness of Norway’s carbon tax “has often been undermined by inconsistencies, either within policy design itself or with other policy goals.”¹⁹²

Norway’s carbon tax has been criticized on several fronts. Most significantly, for failing to evenly apportion the tax burden, instead favoring certain industries.¹⁹³ According to the OECD, “[t]he carbon tax scheme has been inefficient because of high variability of tax rates across emission sources and exemptions.”¹⁹⁴

In 1999, Norway restructured its energy tax system.¹⁹⁵ Part of the reform transformed previous carbon-components in various energy taxes into one unified carbon tax, the motivation of which was to spe-

¹⁸⁸ Fauchald, supra note 79, at 37.
¹⁹⁰ Id.
¹⁹² Id.
¹⁹³ Barde, supra note 165, at 242.
¹⁹⁵ Energy Taxes in Nordic Countries, supra note 77, at 11.
cifically reduce carbon dioxide emissions.\textsuperscript{196} Norway’s current carbon tax is a tax on the use of mineral oils (including fuel oils, auto diesel, and jet fuel), petrol, coal, and coke.\textsuperscript{197} Norway also implemented an additional carbon tax on petroleum activities on the continental shelf.\textsuperscript{198} However, the Norwegian tax scheme continues to exempt a large sector of industry.\textsuperscript{199} The Norwegian carbon tax on coal and coke exempts industries using those products as raw materials, meaning that ninety percent of carbon dioxide emissions are not subject to the carbon tax.\textsuperscript{200} A report sponsored by Eurostat concluded that Norway, like Denmark and the other Nordic countries, needed to readjust its carbon tax system in order to make polluters pay in proportion to their emissions.\textsuperscript{201}

d. The United Kingdom

The United Kingdom is the world’s seventh largest producer of carbon emissions.\textsuperscript{202} The United Kingdom agreed, under the Kyoto Protocol, to keep annual greenhouse emissions to 12.5 percent below its 1990 levels during the initial period (2008-2012).\textsuperscript{203} It set a goal to reduce carbon dioxide emissions by twenty percent by the year 2010.\textsuperscript{204}

The Climate Change Levy (CCL) came into force on April 1, 2001.\textsuperscript{205} The CCL taxes non-domestic use of electricity, natural gas as supplied by a gas utility, liquefied petroleum gas, and coal.\textsuperscript{206} The CCL proposes to “encourage the efficient use of energy, in order to meet the U.K.’s target under the Kyoto Protocol.”\textsuperscript{207} While some lit-

\textsuperscript{196} Id.
\textsuperscript{197} Id. at 12.
\textsuperscript{198} Id.
\textsuperscript{199} See Barde, supra note 165, at 242.
\textsuperscript{200} Energy Taxes in Nordic Countries, supra note 77, at 12.
\textsuperscript{204} Id.
\textsuperscript{205} The primary law on the Climate Change Levy is contained in the Finance Act 2000, Part II. Finance Act 2000, 2000, ch. 17, § 12, § 30, scheds. 6, 7.
erature misleadingly refers to the levy as a carbon tax, the levy is actually a tax on energy, applied at a specific rate per unit of energy consumed.\textsuperscript{208} The CCL notably excludes oil, road fuel gas, and heat.\textsuperscript{209}

The Royal Commission on Environmental Pollution was particularly critical of the CCL for taxing the downstream use of energy.\textsuperscript{210} In other words, the levy is paid by energy users, but “collected from the suppliers of energy products . . . .”\textsuperscript{211} Instead, the Royal Commission argued for the implementation of an upstream carbon tax,\textsuperscript{212} or excise tax, on the producers of raw fossil fuels based on the relative carbon content of those fuels.\textsuperscript{213} As the Royal Commission suggested, a true carbon tax applied to all energy users raises the cost of carbon-packed fuels and appropriately discourages the use of such fuels.\textsuperscript{214} In contrast, the CCL does not discourage the use of carbon-packed fuels because the levy is fixed to energy used and not to carbon content.\textsuperscript{215} Carbon taxes are more efficient than general energy taxes because they specifically target those fuels that contribute to climate change.\textsuperscript{216}

Sometimes, politics can be to blame. The Labour party believed a domestic secondary tax on fuel could be “easily portrayed” by opponents as a “stealth tax” to U.K. consumers, a political killer to a party whose platform included not raising taxes.\textsuperscript{217} Even the developers of

\textsuperscript{208} There is a separate rate for each category of taxable commodity, which “has meant a 10-15\% increase in energy bills, although the business cost of the CCL has been partly offset by a reduction in National Insurance contributions, among other measures.” Oxford City Council, Climate Change Levy (2005), available at \url{http://www.oxford.gov.uk/environment/levy.cfm}. For this reason, the HMRC refuse to label the CCL as a tax, stating: “The CCL is not a ‘tax’ because the revenue from the CCL will be offset by a 0.3 percent reduction in employers’ National Insurance Contributions.” U.K. Environment Agency, Climate Change Levy (CCL) and EU Emissions Trading Schemes (EU ETS), available at \url{http://www.netregs.gov.uk/netregs/275207/1018642/?version=1&lang=_e}.

\textsuperscript{209} Her Majesty’s Revenue & Customs (HMRC), A General Guide to Climate Change Levy § 2.5 (2006).

\textsuperscript{210} Royal Comm’n News Release, supra note 95.


\textsuperscript{212} Royal Comm’n News Release, supra note 95. The Royal Commission on Environmental Pollution is an independent body, appointed by Her Majesty The Queen on the advice of the Prime Minister. See Royal Comm’n on Envtl. Pollution, Royal Commission Calls for Transformation in the UK’s Use of Energy to Counter Climate Change, (June 16, 2000), available at \url{http://www.rcep.org.uk/news/00-2.htm}.


\textsuperscript{214} Royal Comm’n News Release, supra note 95.

\textsuperscript{215} Id.

\textsuperscript{216} See id.

\textsuperscript{217} See Common & Stagl, supra note 211, at 54.
the CCL agreed that because energy is used in the production of all commodities, the CCL tax on energy would eventually “increase the prices paid by final consumers for all commodities.”

Moreover, the Royal Commission rejected Her Majesty’s Revenue and Custom (HMRC) claim that a tax directly relating to the carbon content of fuels was impractical, explaining, “[i]n the case of a fuel used for electricity generation the generator would pay an amount in tax determined by reference to its carbon content and would pass the tax on to distributors and end users through the price charged for the electrical energy.” The Royal Commission’s plan would then exempt carbon-free sources such as wind or hydropower. Ideally, the Royal Commission would like to see such a carbon tax applied Europe-wide; however, the current Government has made it very clear it is against such a tax.

e. Japan

Japan has pledged, under the Kyoto Protocol, to reduce its emission of GHGs to six percent below its 1990 level in the first commitment period (2008-2012). Originally, Japan’s plan to meet its Kyoto commitment consisted of the use of carbon sinks and the reduction of fluorocarbons. Japan determined merely to keep carbon emissions of energy sources from increasing (a zero percent reduction) and set a 0.5 percent reduction target of carbon-dioxide emissions from non-energy sources. The Japanese Government later reconsidered and adopted a new package to achieve its goals under the Kyoto Protocol. The industrial sector is now requested to reduce its carbon emissions by 8.6 percent from 1990 levels in 2010.

In 2004, the Japanese Ministry of Environment first announced a plan for implementation of a carbon tax to help meet Kyoto targets. The proposed tax was directed at all types of fossil fuels and electricity, imposed at the stage of shipment from refineries for gasoline, light

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218 Id.
219 Royal Comm’n News Release, supra note 95.
220 Id.
221 Id.
223 Id.
224 Id.
225 This means that the industrial sector must reduce carbon dioxide emissions by 7.1 percent in 2010 from the 2002 level. Id.
oil, kerosene, and liquefied petroleum gas, and at the final consumption stage for coal, heavy oil, natural gas, city gas, electricity, and jet fuel. However, after enormous pressure from industry, the Ministry announced a revised tax plan on October 25, 2005. The proposed carbon tax exempted coal used in certain types of manufacturing and halved tax rates for businesses that produced large amounts of carbon. The Ministry also delayed the implementation of tax on “gasoline, diesel and jet fuel to avoid putting too much economic burden on end-users.” Under the new plan, a Japanese household would pay an average of 2100 yen a year for electricity, gas, kerosene, and other fuels, 900 yen more per year than under the old plan.

In the OECD’s 2002 Environmental Performance report on Japan, the OECD noted that environmental taxes and charges were used less frequently in Japan than in a number of other OECD countries, and urged that this policy be reviewed. The Japanese Government finally responded to the OECD’s report last year, reporting merely that it was investigating the impact of environmental taxes and discussing the consequences with industry. Indeed, the weight of industry pressures has meant that the Japanese Government has yet to commit to a carbon tax. Yet the Japanese Government must do something, and soon, if it hopes to hit Kyoto targets. Instead of being on track to reduce its GHG levels by six percent, GHG emissions in 2004 were 7.4 percent higher than the 1990 levels.

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227 Id.
228 Japan’s Environment Ministry Now Calls for Carbon Tax by 2007, Reuters, Oct. 26, 2005, available at http://www.greencarcongress.com/2005/10/japans_enviromn.html [hereinafter Japan’s Environment Ministry]. Under the revised tax plan the tax would be 2400 yen per carbon ton (approximately U.S. 20.8 dollars per carbon ton). For example, prices would rise 0.25 yen per kilowatt hour on electricity and 1.5 yen per liter on gas. The burden on the average household would be 2100 yen per year and derive revenue of 370 billion yen per year (approximately U.S. 3.2 billion dollars). Id.
231 Id.
232 Japan’s Environment Ministry, supra note 228.
233 Arita, supra note 229.
3. Tax Credits: The U.S. Example

Fearing a negative impact on industry, the Bush Administration rejected the Kyoto Protocol. Had the United States ratified the Protocol, it would have been required to cut GHG emissions by 7.2 percent of its 1990 level by 2012.\textsuperscript{234} Instead, President Bush’s climate change policy aims to cut GHG emission intensity by eighteen percent by 2012.\textsuperscript{235} The plan also uses tax credits to support the invention and use of energy-saving technologies, and promote absorption of carbon dioxide through forestry and agriculture.\textsuperscript{236} Finally, the plan requires recordkeeping of GHG emissions and encourages the private sector to reduce emissions voluntarily.\textsuperscript{237}

The Bush Administration will likely meet its target of reducing emissions intensity by eighteen percent over a decade.\textsuperscript{238} Policies set in motion by the Bush Administration will probably have little to do with this success; rather a bit of black magic accounting is likely to carry the day. Emissions intensity is calculated by dividing emissions by the real gross domestic product (GDP). With GDP projected to grow by three percent annually, the Bush Administration’s figures suggest that emissions can actually increase by 10.2 percent and still satisfy the intensity target.\textsuperscript{239} To avoid this result, the Kyoto Protocol sets a base year and requires its signatories to reduce actual emissions levels relative to that base year.\textsuperscript{240} In contrast, the Bush Administration’s own forecasts “indicate that the plan allows emissions in 2012 to be over 95 percent of what they would have been with no policy.”\textsuperscript{241}

The Energy Policy Act of 2005 (EPACT) provides several tax credits to businesses and individuals who choose environmentally friendly

\textsuperscript{234} CNN (Mar. 9), \textit{supra} note 31.
\textsuperscript{235} Press Release, Bureau of Oceans and International Environmental and Scientific Affairs, United States Global Climate Change Policy, Oct. 23, 2002, \textit{available at} http://www.state.gov/g/oes/rls/fs/2002/14576.htm. Emissions intensity is the ratio of emissions to Gross Domestic Product (GDP). \textit{Id.} According to the U.S. State Department, “[t]he President’s goal is to lower the United States’ rate of emissions from an estimated 183 metric tons per million dollars of GDP in 2002, to 151 metric tons per million dollars of GDP in 2012.” \textit{Id.}
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} RFF, \textit{supra} note 50, at 208.
\textsuperscript{239} See Goulder, \textit{supra} note 236, at 2–3.
\textsuperscript{240} Kyoto Protocol, \textit{supra} note 40, art. 3.
\textsuperscript{241} Goulder, \textit{supra} note 236, at 3.
products.\textsuperscript{242} As a tax credit, a consumer or business will be able to reduce its federal tax liability dollar for dollar.\textsuperscript{243}

EPACT “offers consumers and businesses federal tax credits beginning in January 2006 for purchasing fuel-efficient hybrid-electric vehicles and energy-efficient appliances and products,”\textsuperscript{244} including up to a $3400 dollar reduction in income tax liability for individuals and business that purchase a hybrid gas-electric car.\textsuperscript{245} However, according to a recent Consumer Reports, “hybrids are typically priced thousands of dollars higher than similar all-gas models,”\textsuperscript{246} and “even the most cost-effective models require an investment of about five years for the owner to break even.”\textsuperscript{247}

Thus, in terms of the hybrid car, the federal tax credit simply re-aligns the cost of the vehicle with that of a non-hybrid vehicle. Similarly, EPACT’s credit system may not make other environmental friendly alternatives (for example, solar-heated pools and energy-efficient windows) cheaper than their unfriendly alternatives. Notably, however, a consumer must pay a premium price (potentially thousands of dollars) for these alternatives for the promise of reimbursement a year later on his or her tax return. Given this extra hurdle, EPACT will probably only impact already green-minded consumers.

EPACT should be extended beyond its 2007 expiration because it is an aid to already green-minded consumers and, over time, the increased demand for environmentally friendly alternatives could drive down the prices of such alternatives. However, EPACT is not enough. The United States must also adopt a direct emissions policy to have any real impact.

\textsuperscript{243} See generally id.
\textsuperscript{245} \textit{Id.}
\textsuperscript{247} See \textit{id}. Cost savings over time, if any, will vary. Factors include the model of car, how much a person drives, and state tax incentives. \textit{See id.}
V. ALTERNATIVES TO GREEN TAXATION

A. Carbon Sinks

Trees and other plants use carbon to grow while releasing oxygen into the atmosphere. Carbon sinks are simply large areas or reservoirs where this process takes place. The Earth’s largest carbon sinks are its oceans and forests. In other words, more trees means less carbon dioxide. Under the Kyoto Protocol, a new or expanded forest is allowed to generate credits for removing carbon from the atmosphere.

Several countries have embraced carbon sinks as part of their plans to meet Kyoto targets. Japan, as mentioned, expects carbon sinks to play an integral part in meeting its Kyoto targets. Under Japan’s Action Plan, it is “allowed credits of up to 13 million tons of carbon per year from forest sequestration, which can be used against its emissions.” As such, the use of carbon sinks in Japan may account for more than half of the carbon reductions from the 1990 base year. To this aim, Japan has enacted the Forest and Forestry Plan and other relevant plans. According to economists Masahiro Amano and Roger A. Sedjo, Japan is in a particularly good position with regard to carbon sinks because it has relatively young forests and more carbon will be sequestered as they mature. However, once trees mature carbon sequestration levels off. Japan may still need to decrease current rates of deforestation. This could mean substituting lost timber with imports, not a globally satisfying outcome as this simply displaces timber harvesting offshore.

248 Roger A. Sedjo, Forest ‘Sinks’ as a Tool for Climate-Change Policymaking: A Look at the Advantages and Challenges, RFF, supra note 50, at 240.
249 Id.
250 See id.
251 Id.
253 Id. at 13.
254 Id.
255 Nakatani, supra note 222.
256 AMANO & SEDJO, supra note 252, at 13.
257 Id. at 13.
258 Id.

Though carbon sinks seem promising, in a report published by the U.K. Royal Society, scientists warned that carbon sinks are not a long-term substitute for emissions cuts.\footnote{Alex Kirby, \textit{Carbon Sinks ‘Little Help to Climate’}, BBC News, July 8, 2001, http://news.bbc.co.uk/1/hi/sci/tech/1426453.stm.} Professor David Read, chair of the report, warned that “the size of the potential sinks is quite modest,” and as such, they would “all be used up in a few decades.”\footnote{Id.}

Read also argued that rising global temperatures could make bacteria more active, which will break down carbon faster.\footnote{Id.} Other scientific studies suggest that carbon sinks cannot possibly keep up with rising carbon emissions.\footnote{See, e.g., Inez Y. Fung et al., \textit{Evolution of Carbon Sinks in a Changing Climate}, 102 PROC. NAT’L ACAD. SCI. 11201, 11205 (2005).} A Princeton-led study found that in the United States alone, forests and soil absorb from one-third to two-thirds of a billion tons of carbon each year (an amount that surprised many of the participating scientists), yet U.S. carbon emissions are up to four times that amount, indicating the need for actual emissions cuts.\footnote{John Roach, \textit{Studies Measure Capacity of “Carbon Sinks,”} NATIONAL GEOGRAPHIC News, June 21, 2001, http://news.nationalgeographic.com/news/2001/06/0621_carbon-sinks.html.} A spokesperson for the Norwegian Ministry of the Environment stated that Norway would probably not use carbon sinks to reach its targets, because Norway is “concerned with real qualitative emissions reductions, not fictitious ones that are just on paper.”\footnote{Bunny Nooryani, \textit{Norway Says Will Not Use Kyoto ‘Sink’ Loophole}, REUTERS, Aug. 7, 2001, http://www.planetark.org/dailynewsstory.cfm?newsid=11926.}
B. Emissions Permit Trading Schemes

1. In General

The most commonly implemented form of emissions trading is a cap-and-trade system.\(^{266}\) Under a cap-and-trade scheme, regulators first set emission reduction goals and then, from this figure, establish a cap on total emissions. Regulators then allocate a fixed number of allowances to participants, each allowance representing a specific authorization to pollute (e.g. one ton).\(^{267}\) These allowances are often referred to as rights-to-pollute or credits. The regulatory authority monitors participants closely and at the end of the compliance period participants must have a sufficient number of allowances to cover their pollution for that period.\(^{268}\) Participants anticipating a shortfall in allowances at the end of the compliance period can buy additional allowances from participants holding excess allowances. Unlike traditional CAC systems, individual control requirements are not set for specific sources, making the trading scheme more flexible for industry.\(^{269}\)

2. U.S. Success with Permit Trading

The EPA first applied the concept of emissions permit trading in the United States in the mid-1970s. Notably, the Agency based the original model on an interpretation of the Clean Air Act, not on specific statutory authority.\(^{270}\) At the time, the EPA viewed permit trading as a sensible model for preventing air quality from worsening. Under

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\(^{266}\) Cap-and-trade and emissions trading are often used synonymously in the academic literature. Systems of rate-based trading or project-based trading are also possible. In a rate-based emissions trading scheme, the “regulatory authority sets a constant or declining emission rate of performance standard (e.g. tons of emissions per megawatt hour).” EPA, Types of Trading, http://www.epa.gov/airmarkets/cap-trade/index.html (last visited Jan. 10, 2007) (follow “Types of Trading (PDF)” hyperlink).

\(^{267}\) Three Forms of Emissions Trading, supra note 266, at 1.


\(^{269}\) Id.

\(^{270}\) EPA U.S. Economic Incentives, supra note 74, at 67.
the aptly named Emissions Trading Program (ETP), new entrants to the market were required to purchase credits from already existing industry members. Building on the ETP’s success, Congress, under the 1990 Clean Air Act amendments, specifically authorized a variety of emissions trading schemes, including the Acid Rain Program.

The Acid Rain Program is perhaps the best-known trading success story out of the United States. In the 1970s, emissions of sulfur dioxide, the leading component of acid rain, posed a serious threat to U.S. fish, water supplies, and was a known cause of respiratory disease. Under the 1977 Clean Air Act, regulators commanded polluters to affix a “scrubber” to factory stacks, to strip out sulfur dioxide emissions. Economists estimated that it would cost industry ten billion dollars each year to comply with traditional CAC regulation, such as the “scrubber” solution, to deal with acid rain.

Congress instead gave polluters more flexibility with the 1990 Amendments. The cap-and-trade program gave polluters a limited number of emissions allowances that polluters were allowed to sell. In the end, the cost of cleaning up sulfur dioxide in the United States is about one billion dollars per year. Partial credit should be given to the flexibility of the cap-and-trade scheme. The start of the Acid Rain Program in 1995 also lowered sulfur dioxide emission levels from the power sector and has contributed to significant improvements in air quality and public health.

Apart from the Acid Rain Program, the United States has implemented a number of other successful trading schemes on a national level, including CFC and halon trading. In 2006, the EPA proposed cap-and-trade rules to address mercury, sulfur dioxide, and nitrogen oxide emissions. Under the Clean Air Mercury Rule (CAMR), the EPA plans to “permanently cap and reduce mercury emissions from coal-fired power plants.” If implemented, the United States would be

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271 Id.
272 Svendsen, supra note 75, at 72 (The United States also implemented a trading program to phase-out the use of lead in gasoline between 1982 and 1987.).
273 Kerr, supra note 68.
274 Id.
276 See, e.g., id. § 7651 (providing for a cap-and-trade program to reduce acid rain).
277 See EPA U.S. ECONOMIC INCENTIVES, supra note 74, at 70.
278 See id.
279 See id. at 69–70.
280 Svendsen, supra note 75, at 72.
the first country in the world to regulate mercury admissions.282 The partner to CAMR is the Clean Air Interstate Rule (CAIR), which aims to permanently cap emissions of sulfur dioxide and nitrogen oxides in the eastern United States.283 Both cap-and-trade schemes allow states to administer the plans, determine their own caps on emissions, and develop their own system of distributing allowances.284 Each state’s plan is subject to the approval of the EPA.285

Environmentalists have accused the EPA of caving to political pressure and abandoning its initial position in favor of traditional CAC regulation for mercury pollution.286 The EPA originally favored a law requiring utility coal-fired power plants to install controls to scrub off as much mercury as possible before it could be released into the air.287 Environmentalists contend, and the EPA’s own studies suggest, that trading schemes can result in “hotspots” or pockets of pollution around companies that purchase excess allowances. Still, the EPA says it now favors the proposed trading scheme, the alternative favored by the Bush Administration and industry, in cleaning up mercury.288 Despite the presumed compromise, neither CAMR nor CAIR have been implemented.289

A number of U.S. States have successfully implemented emissions trading schemes. For example, in 1994, California initiated the Regional Clean Air Incentives Market (RECLAIM) program to curb nitro-

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284 Id.; Mercury Rule, supra note 282.
285 Barringer, supra note 283.
286 See, e.g., id.
287 Id. For instance, “Felice Stadler, a mercury policy specialist at the National Wildlife Federation, was sharply critical when told . . . of the thrust of the new rule, saying that it was ‘the weakest air-toxics rule ever written for a major industry’ by the E.P.A.” Id.
In the United States, trading schemes have also developed regionally. For instance, several Northeast States developed the Budget Trading Program (BTP) of the Ozone Transport Commission (OTC), a cap-and-trade program, aimed at reducing summertime nitrogen oxide emissions.\textsuperscript{295} The BTP actively traded from 1999 to 2002, when it was replaced by the current SIP Call.\textsuperscript{296}

Surprisingly, private U.S. companies have also developed emissions trading schemes without the heavy-hand of government. The Chicago Climate Exchange (CCX) is a voluntary, legally binding GHG emissions trading scheme in North America.\textsuperscript{297} Twenty-eight companies, including the Ford Motor Company and DuPont, developed the CCX in conjunction with the cities of Chicago and Mexico City.\textsuperscript{298}

\textsuperscript{290} Svendsen, supra note 76, at 72; see also Regional Clean Air Incentives Market (RECLAIM), South Coast AMQD (2004), http://www.aqmd.gov/reclaim/reclaim.html (requiring industries and businesses to cut their emissions by a specific amount each year, resulting in a seventy percent reduction for nitrogen oxides and a sixty percent reduction for sulfur oxides by 2003).


\textsuperscript{292} Id.

\textsuperscript{293} EPA U.S. Economic Incentives, supra note 74, at 96.

\textsuperscript{294} Id.


Members made modest pledges to reduce GHG emissions by two percent from 1999 levels in 2002 and by an additional one percent per year for the period from 2003 to 2006. The decision by corporate business to form the CCX probably had a lot to do with the anticipation of future government-imposed emissions restrictions, and a lot less to do with being good global citizens. Thus, with the subsequent U.S. rejection of the Kyoto Protocol it remains to be seen whether U.S. corporate business will continue to develop and voluntarily participate in such schemes.

3. EU Emissions Trading Scheme (Directive 2003/87)


Initially, the scheme “covers only carbon dioxide emissions from installations in five sectors (power, oil, steel, minerals, and pulp and paper).” While Member States are allowed to devise their own schemes as set forth in their NAP, each plan is subject to the Commission’s approval, similar to the U.S. CAMR and CAIR programs. For instance, each Member State determines the total quantity of allowances it intends to allocate, and precisely how it plans to allocate them. An important aspect in the success of an emissions trading scheme is the level of scrutiny the acting authority has in approving

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299 Id.
300 Id.
304 Andrew G. Thompson, Australia and an Emissions Trading Market—Opportunities, Costs and Legal Frameworks, 4 Int’l Energy L. & Tax’n Rev. 79, 81 (2005). “Combustion installations over 20MW [megawatts] capacity in other sectors are also included. Other sectors and other gases may be included from 2006.” Id.
and monitoring plans.\textsuperscript{305} The Commission must approve the NAPs submitted by Member States, though it is debatable whether the Commission has committed the necessary resources to evaluate adequately whether the programs will actually work.\textsuperscript{306}

Economists have criticized the EU Trading Scheme as “almost worthless” because Member States, in caving to industry, have issued too many allowances.\textsuperscript{307} Michael Grubb, an expert economist in climate change, agrees with this grim outlook and believes “[t]here will be very few buyers [of allowances] and prices will fall through the floor.”\textsuperscript{308} For example, a report by the U.K. Department for Environment, Food and Rural Affairs (DEFRA) suggests that the original figure of 736 million tons of carbon dioxide, submitted by the United Kingdom in its NAP, would only have required industry to reduce emissions by less than one percent.\textsuperscript{309} To make matters worse, industry successfully lobbied the U.K. Government and the figure was increased to 756 million tons of carbon dioxide in an amendment to its NAP.\textsuperscript{310} While this figure has met resistance by the Commission, it provides an example of a Member State willing to do the paperwork


The United Kingdom challenged the Commission’s refusal to accept the U.K. amendment to its NAP in United Kingdom v. Commission of the European Communities. Notice C22/27, 2006 O.J. (C 22) 14, 14 (referring to case T-178/05, decided in the Court of First Instance on Nov. 23, 2005). The Commission actually notified the United Kingdom that parts of the original NAP were unacceptable and thereby required the United Kingdom to change certain aspects of the original NAP by amendment. Case T-178/05, U.K. v. Comm’n Eur. Cmtns., 2005 ECJ CELEX LEXIS 609, ¶¶ 7, 8. However, the Commission refused to accept the amendment because the United Kingdom had included an increase in the total emissions allowed. \textit{Id.} ¶ 10. The court held in favor of the United Kingdom, finding that the United Kingdom had a right to amend its NAP, in every aspect, up to the deadline. \textit{Id.} at Decision, pt. 1. Nonetheless, this is a shallow victory for the United Kingdom as the Commission still has the right, after review, to deny the current proposal.


\textsuperscript{308} \textit{Id.}

\textsuperscript{309} DEFRA, supra note 301.

for the EU Trading Scheme, but unwilling to do the hard work in curbing carbon emissions.

Other experts have criticized the Emissions Trading Scheme for its limited scope. The current scheme covers emissions only until 2007. Further, the Scheme only addresses about half of the carbon emitted in the European Union because it does not address emissions from vehicles. Finally, not all countries of the European Union have joined: Poland, Italy, the Czech Republic, and Greece failed to submit allocation plans in time.

VI. DECIDING BETWEEN GREEN TAXATION AND EMISSIONS TRADING

A. The Case for Permit Trading over Green Taxation in Lowering Carbon Emissions

Permit trading can oftentimes be politically achievable when industry interests have stalled green taxation. In some cases, the implementation of an environmental tax will involve enormous increases in costs to industrial polluters. Therefore, these polluters will expend large sums of money lobbying politicians to reject the tax and put in its place a trading scheme.

Politicians must also answer to their constituents. Taxes can be extremely hard to sell to voters, especially outside of Northern Europe. Indeed, most policymakers have accepted that economic models promising to rid countries of unemployment and the like through the application of a green tax simply could not work in the real world. Even in Northern Europe, taxes could not be set high enough to achieve such lofty goals. In the case of the European Union, its own structure inhibits the implementation of a common carbon tax because it requires unanimity for fiscal measures. Countries such as the United Kingdom have stood firm against a common carbon tax. In contrast, a

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311 Pearce, supra note 307.
313 Svendsen, supra note 76, at 45.
314 See discussion supra Part IV.C.1 (double dividend).
315 Id.
316 Svendsen, supra note 76, at 167.
317 See discussion supra Part IV.C.1 (double dividend).
permit market is not fiscal in nature and may thus be passed by majority rule.\textsuperscript{318}

Whereas the idea of permit markets may be more politically attainable than green taxes, getting these markets off the ground can be a political struggle.\textsuperscript{319} It is often difficult to gain agreement on the distribution of the initial assignment. For example, the EPA has yet to get political and industry agreement to implement the CAMR and CAIR trading programs.\textsuperscript{320}

Permit trading is also more economically feasible for industry than green taxation. Even the most devout environmentalists must acknowledge the potential for economic damage as a result of ill-conceived green taxes.\textsuperscript{321} Trading schemes provide greater flexibility for industry than green taxes and the market, rather than a government agency, is better able to determine the cost of cleaning up GHGs under emissions trading schemes.\textsuperscript{322} Conceptually, trading schemes should be more economically efficient than green taxes.

Governments, like industry, are also concerned about maintaining industrial competitiveness in the world market, and thus, may favor trading schemes.\textsuperscript{323} For instance, the United States and Australia unapologetically withdrew their support for the Kyoto Protocol citing their concern that binding emissions cuts would hinder competitiveness.\textsuperscript{324} Many politicians fear green taxes will similarly impede industry and hamper their own political ambitions.\textsuperscript{325} In contrast, permit trading schemes are more flexible and allow industry a greater opportunity to mitigate loss.\textsuperscript{326} Less cost to national industry means it can maintain its position on the global market.

Permit trading systems may also induce reluctant members through the application of grandfathered schemes. A grandfathered permit market builds on historical emission levels and the status quo, thus assuring current members of the market an advantage over new entrants.\textsuperscript{327} GHG emissions do not abide by human borders; therefore, countries that continue to do business as usual can benefit from

\textsuperscript{318} Svendsen, supra note 76, at 167.
\textsuperscript{319} See discussion supra Part III.B.1.
\textsuperscript{320} See discussion supra Part V.B.2.
\textsuperscript{321} See discussion supra Part IV.C.
\textsuperscript{322} See, e.g., discussion supra Part V.B.2 (describing various U.S. programs).
\textsuperscript{323} Svendsen, supra note 76, at 166.
\textsuperscript{324} See discussion supra Part IV.C.2.
\textsuperscript{325} Id.
\textsuperscript{326} See discussion supra Part V.B.1.
\textsuperscript{327} See discussion supra Part III.A.2.
the decrease in GHG emissions elsewhere (i.e. become “free riders”). Inducing reluctant international members to join the scheme may mean the permit market can mitigate the free-rider problem.

On a more cynical note, industries may be more likely to comply with permit trading schemes. Green taxes, like most taxes, encourage creativity on behalf of taxpayers. For instance, due to the high carbon tax in Norway, Statoil, an integrated oil and gas company, has developed a process to divert its carbon emissions into a large aquifer under the North Sea. The most liberal estimates suggest that this layer of permeable sandstone rock may be able to store carbon for several hundred years. However, even if these optimistic projections are true, this process only delays the inevitable release of carbon emissions into the atmosphere. Storing carbon and hoping that future generations develop the means to ameliorate the problem is not sound environmental policy. Though Norwegian policymakers probably did not expect to encourage such activities, this result is the risk run by implementing any form of green tax.

This is not to insinuate that the possibility of tax planning or tax avoidance should nullify the use of a carbon taxes. The likelihood that more companies will follow the example of Statoil, however, suggests two important policy ideas. First, drafters of a carbon tax should be aware of such technological developments and need to determine if such developments should be addressed. Second, taxpayers will inevitably try to avoid taxation, which may be one reason for choosing a permit scheme in addressing GHG emissions.

In implementing a trading scheme, the environmental authority will first determine the maximum amount of allowable emissions for the year. Then the authority allocates the corresponding number of permits to the trading participants (e.g. one ton per allowance). If a participant does not have enough permits to cover its emissions at the end of the trading period, the participant will be charged with a steep fine and potentially face other consequences. Assuming these consequences are stiff enough to be an adequate deterrent, the target set by the authority should be closely tied to the actual emissions in that

328 See Svendsen, supra note 75, at 146.
330 Id.
331 See id.
332 See id.
period.\textsuperscript{333} In this respect, the permit trading scheme has a similar effect to traditional CAC regulation, although a closely monitored CAC rule may come even closer to the target.\textsuperscript{334}

In contrast, a tax on emissions is relatively poor at producing the target level of pollution.\textsuperscript{335} Taxes on GHG emissions provide a price incentive for industry to decrease polluting, but it can be extremely difficult for the environmental authority to anticipate the reaction by industry.\textsuperscript{336} In some cases, the tax may be too low, and thus emissions levels may not improve much at all.

Taxes require a trial-and-error process and can require costly readjustments.\textsuperscript{337} The charging authority may require years to determine where the GHG is most efficient. Administrative costs, not to mention the economic and environmental costs, can be large. Additionally, complications inevitably arise due to price inflation and economic growth.\textsuperscript{338} Thus, the tax will always require readjustments.

\textbf{B. The Case for Green Taxation over Permit Trading in Lowering Carbon Emissions}

While green taxation can provide government with a revenue source, the amount of revenue will be a function of the level of tax and administrative costs.\textsuperscript{339} The days of the golden double dividend appear to be gone. Economic models suggesting governments could eradicate unemployment with sufficient green taxes did not stand up in the real world.\textsuperscript{340} That said, existing green tax regimes suggest it is entirely possible to simultaneously reduce other “bad” taxes.\textsuperscript{341} Also, governments may choose to recycle some tax revenue back into environmental projects.\textsuperscript{342} Such systems reflect sound policy choices because, in essence, the environment receives a double dividend. Naturally, government must spend sufficient resources in determining the appropriate level of tax and where to appropriate any resulting revenue. In some cases, ad-
ministrative costs can be greater than the tax assessed and thus provide a negative source of revenue, a result to be avoided.

Since permit trading schemes allow polluters to purchase extra allowances, some polluters will continue doing business as usual. As such, environmentalists criticize some trading schemes for creating “hotspots” (areas in which GHG emissions remain strong). For instance, environmental groups have called for stringent mercury regulation in the United States and have argued that mercury is too great a health hazard to be an appropriate candidate for market-based regulation, which can result in uneven enforcement and protect some populations more than others.

Taxation on GHGs is also market-based and simply provides a price incentive for firms to decrease GHG emission and can, theoretically, result in hotspots. Recent studies suggest permit trading schemes are more likely culprits. Grandfathered permit schemes are especially likely to create this negative public health effect because entrenched industry is favored and thus may be allocated enough permits to cover its prior emissions levels. These established industries are also quite likely to reside in the same geographical area for reasons having to do with available resources or the history of development. Further scientific discovery will answer whether carbon dioxide and other greenhouse gases lead to such hotspots.

Carbon taxation may also make more sense in economic terms than the alternative permit trading system. There is enormous uncertainty regarding the costs and benefits of carbon abatement and, therefore, “it can make a big difference whether you regulate by quantity (that is, caps) or with price (that is, with taxes).” Economists argue that the per-unit benefits of carbon abatement change little relative to the amount of the overall carbon dioxide in the Earth’s atmosphere. Conversely, the per-unit costs to factories and utilities change a lot. Therefore, economists reason the tax is preferable to a trading system because the tax, theoretically, can be set at a rate that can never greatly exceed the benefits. (Extensive research would be required to achieve the correct tax rate.) The trading system, on the other hand,

343 See discussion supra Part III.B.4.
344 See discussion supra Part V.B.2.
345 See id. (describing “hotspots” in trading schemes).
346 Sullivan, supra note 117, at 538.
347 Id.
348 Id.
349 Id.
depends on a volatile market with much less certainty.\textsuperscript{350} In other words, “a reasonable carbon tax would never impose unreasonable costs on the reduction of carbon emissions, but a quantity target could”\textsuperscript{351} and “preserving the cap at all costs is simply not worth it.”\textsuperscript{352}

Carbon taxes also have the ability to reduce other taxes.\textsuperscript{353} Theoretically, the permit trading system may also raise revenue which may in turn be used to reduce bad taxes. In practice, governments simply give away permits to polluters, raising no public revenue.\textsuperscript{354} Moreover, while both carbon taxes and permit trading systems carry administrative burden, the permit market may turn out to be more costly because of the need to develop a complex secondary market.\textsuperscript{355} For example, hiring brokers and developing expertise in the secondary permit market is expensive.\textsuperscript{356}

Finally, fairness should be considered. Getting industry-wide agreement on the “fair” allocation of permits can be especially difficult, perhaps impossible.\textsuperscript{357} In grandfathered permit schemes, emissions allocations are normally determined as a percentage of historical emissions.\textsuperscript{358} However, companies that reduced emissions prior to the base year or companies rapidly growing will inevitable get the short end of the stick compared to entrenched large polluters.\textsuperscript{359} As such, the carbon tax may be across the board “fairer.”

C. Carbon Taxations Is Preferable to Permit Trading

Policy choices regarding carbon emissions are not simple. The meeting of politics, science, economics, and moral choice will always lead to lively discussion. Indeed, climate change and what to do about it has leapt from scholarly journals and now entered our everyday conversations, for good reason. Now the tough choices have to be made. With what we know today, carbon taxation is the superior form of carbon abatement. On balance, carbon taxation provides greater price certainty to industry, is simpler to implement, produces the greatest

\textsuperscript{350} Id. at 538–39.
\textsuperscript{351} Sullivan, supra note 117, at 538.
\textsuperscript{352} Id. (quoting economist William Pizer).
\textsuperscript{353} See discussion infra Part IV.C.1 (double dividend).
\textsuperscript{354} Sullivan, supra note 117, at 539.
\textsuperscript{355} Id. at 538.
\textsuperscript{356} Id.
\textsuperscript{357} Id. at 539.
\textsuperscript{358} Id.
\textsuperscript{359} See Sullivan, supra note 117, at 539.
chance of reducing bad taxes, and is arguable fairer to all types of polluters than the alternative permit trading scheme.

**Conclusion**

Mounting scientific evidence suggests that man-made GHG emissions (especially carbon dioxide emissions) are a contributing factor to global climate change. In economic terms, pollution is a negative externality that the market itself cannot correct. As such, governments have traditionally used CAC regulation to control emissions. CAC regulation is effective in controlling emissions as it requires each polluter to reduce GHG emissions, for example, by forcing polluters to install scrubbers to industrial stacks to remove pollutants. Unsurprisingly, this heavy-handed approach has proved unpopular with industry due to its inherent inflexibility.

Green taxation and emissions trading schemes, on the other hand, provide economic incentives for polluters to reduce emissions. As such, these EIs do not demand each polluter reduce emissions, but rather aim to reduce overall GHG emissions. Green taxation provides a price incentive for polluters to curb GHG emissions. However, green taxation may be ineffective in curbing GHG emissions if the tax is set too low or exempts large sectors of industry. Taxes set too low become mere revenue raising mechanisms at best. Exempting large polluters abandons the “polluter pays principle” and can have little effect in curbing GHG emissions.

Alternatively, permit trading schemes have been successfully implemented in the United States and have proven effective in curbing sulfur dioxide emissions, for one. While these markets are often supported by industry policymakers should consider the superiority of green taxation. A detailed analysis of both the theoretical and practical arguments regarding carbon taxation and alternative emissions permit trading scheme shows that carbon taxation is the superior method of carbon abatement. While taxes are often politically unfavorable, especially in the United States, our discussion should not stop there. If sound policy reasons in favor of a carbon tax cannot win over politicians and voters perhaps the U.S. and other countries could follow in the footsteps of the U.K.—simply change the name. “Levy,” for some reason, has a better political ring than “tax.”
ANTARCTICA’S FROZEN TERRITORIAL CLAIMS: A MELTDOWN PROPOSAL

JILL GROB*

Abstract: Antarctica has been a site of peace and scientific exploration for the last fifty years, largely due to a series of agreements known collectively as the Antarctic Treaty System (ATS). But the continent is not free from potential conflicts. A key compromise for ATS parties was the “freezing” of various countries’ territorial claims. However, these territorial claims did not go away, but merely remained hidden beneath the surface of future policies. The author argues that continued suppression of these claims will not further ATS party goals for Antarctica: peace, no military activity, and scientific inquiry. Since many countries rely on oil for their energy needs, Antarctica may become more desirable for commercial exploitation if current sources become too expensive. Therefore, latent territorial claims could seriously undermine continued compromise by ATS parties. Regrettably and unnecessarily, the environment, scientific advances, and international peace would all be placed at great risk.

Introduction

Antarctica is a barren continent consisting of very little plant or animal life, and almost no human activity except for the research activities of the scientists that work there. As a scientific resource, Antarctica is vast and valuable, but beyond that it is a very undesirable place for human habitation. With its harsh temperatures and a top layer of “land” consisting of glacial ice, Antarctica does not possess an indigenous population, nor a population that has attempted to colonize and settle the area.

These factors have not prevented some countries from trying to claim sovereignty over parts of Antarctica. Though inhospitable, Ant-
arctica contains the possibility of vast riches in the form of mineral resources.\(^6\) In the early part of the twentieth century, seven countries made competing claims to areas of Antarctica.\(^7\) Spanning the globe, these claimants included Chile, Argentina, France, Norway, Great Britain, New Zealand, and Australia.\(^8\) In the wake of World War II and with Cold War hostilities on the rise, non-claimant nations like the United States and the Soviet Union showed increased interest in the disputed territory as well.\(^9\) To alleviate the conflict, all nine of these countries, along with Belgium, Japan, and South Africa, negotiated the Antarctic Treaty in Washington, D.C. on December 1, 1959.\(^10\) It went into force in June of 1961.\(^11\) The Treaty did not parse out the competing sovereignty claims.\(^12\) Instead, it established a system of joint-governance by the Treaty parties.\(^13\)

Nonetheless, the sovereignty issue was not completely ignored.\(^14\) Article IV of the Antarctic Treaty resolved the competing sovereignty claims by, in essence, suspending resolution of the claims until some indefinite future date.\(^15\) Thus, for the moment, member countries have agreed to quiet their sovereignty claims in the greater interest of the articulated goals of the Treaty.\(^16\) The territorial claims, therefore, have merely been “frozen.”\(^17\) These claims could resurface at any time should a party to the Treaty wish to rekindle its claim.\(^18\) Rekindling a

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\(^7\) Joyner, *supra* note 1, at 14.


\(^14\) See Joyner & Theis, *supra* note 9, at 34.

\(^15\) Antarctic Treaty, *supra* note 10, art. IV; see Beeby, *supra* note 10, at 6 (explaining that the Treaty sets the sovereignty issue to the side).

\(^16\) See Beeby, *supra* note 10, at 7.

\(^17\) Sahurie, *supra* note 6, at 185; see Suter, *supra* note 3, at 9.

\(^18\) See Sahurie, *supra* note 6, at 303 (highlighting the complexities of territorial claims if the Treaty ever ceases to be in force).
claim, however, would violate Article IV of the Antarctic Treaty. Such a violation could threaten the delicate balance that holds Treaty parties together and perhaps cause the entire Treaty system to collapse.

Although preserving these sovereignty claims may have been a brilliant political compromise in 1959, it poses problems for 2007 and beyond. Part I of this Note explains the history of territorial claims to Antarctica, the history of the Antarctic Treaty, and how the issues of mineral resource activity and territorial sovereignty have been treated in the past. Part II explains competing theories relating to Antarctica and their application to the sovereignty and mineral resource dilemma. Part III weighs the costs and benefits of eliminating the frozen territorial claims and proposes that they should be eliminated from the Treaty. If the three goals of the 1959 Treaty are truly the goals to which the Treaty parties aspire, then this solution will assure that the Treaty manifests in practice what it aspires to do in its text. This solution serves the current interest in protecting the Antarctic environment, and the world environment, from the harms of mining in Antarctica. If the situation were to change in the future and Antarctica were to become a necessary source of mineral resources for the world’s people, Antarctica’s de-claimed status would better facilitate a plan for mining the resources. Without any national interests at stake—with all the potential and actual territorial claims eliminated—Treaty parties could best negotiate a solution for resource allocation that is in the interest of all nations.

19 See Antarctic Treaty, supra note 10, art. IV(2) (proclaiming that “[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force”).
20 See Beeby, supra note 10, at 18.
23 See Joyner & Theis, supra note 9, at 139.
25 See Sahurie, supra note 6, at 439–40 (noting that increased outside interest in exploiting oil resources in Antarctica led to interest by Treaty parties to address the issue).
26 Joe Verhoeven, General Introduction, in The Antarctic Environment and International Law 11, 14 (Joe Verhoeven et al. eds., 1992); see infra Part III.D.
I. Background

A. History of Claims to Antarctica

Britain was the first country to claim sovereignty over an area of Antarctica in 1908.27 New Zealand advanced the next claim in 1923, followed by France in 1924.28 The next claims were made by Australia in 1933, Norway in 1939, and Chile in 1940.29 Argentina made a series of claims starting in 1927, refining its claim up until 1957.30 These countries proposed a variety of justifications for their claims, including discovery, occupation, geographical proximity, geographical affinity, and sector theories.31 Regardless of the justifications for the claims, all seven of these claims manifest the idea that Antarctica is a space that can be claimed.32

All seven of the aforementioned claimant countries were parties to the 1959 Antarctic Treaty.33 The five non-claimant nations that rounded out the parties to the 1959 Treaty were Belgium, Japan, South Africa, the Soviet Union, and the United States.34 Of those five countries, the Soviet Union and the United States reserved the right to make claims in the future, which was acknowledged in Article IV of the Treaty.35 Thus, the Soviet Union and the United States occupy a middle ground between the seven pure claimant states and the three other non-claimant states.36 Of the seven claimant states, only Australia, New Zealand, Norway, France, and Great Britain recognize the claims of the others.37 The United States and Soviet Union, however, abide by a “no claims” principle, whereby they assert no claims and acknowledge no claims by others, while still reserving the right to make future claims.38 The three other non-claimant countries agreed to the frozen claims

27 Suter, supra note 3, at 16.
28 Myhre, supra note 8, at 14–15.
29 Id. at 13–15.
30 Id. at 12–13.
31 See generally id. at 7–15.
32 Peterson, supra note 13, at 35.
33 Id. at 40–41.
34 Id.
35 Antarctic Treaty, supra note 10, art. IV(1)(a) (explicitly reserving such rights); Suter, supra note 3, at 16.
36 See Suter, supra note 3, at 16.
38 Suter, supra note 3, at 16; see Joyner & Theis, supra note 9, at 39–40.
and did not acknowledge the claims of claimant-countries, yet did not reserve a right to advance future claims.39

Additional nations have ratified the Treaty over the years, including India and China in 1983, and Cuba in 1984.40 By ratifying the Treaty, these countries agreed to the compromise in Article IV to freeze past territorial claims and also agreed not to advance any new claims of their own.41 Some developing nations, however, as well as the United Nations (U.N.), have expressed the view that Antarctica is the type of territory that cannot be claimed by any nation.42 Even some of the original treaty parties that made claims in the past now agree with this viewpoint.43 A variety of justifications exist for the idea that Antarctica should remain unclaimed, ranging from the philosophical to the practical.44 The philosophical reason advanced is that Antarctica is a “global commons,” meaning that the territory cannot be owned by any one nation, but rather is owned, in a sense, by all nations.45 The more practical reason is that Antarctica is a large area within which the potential for environmental damage is great, with detrimental effects that could reach all nations of the world.46 Under this view, Antarctica should be designated as a “world park” so that all nations can benefit from the positive effects of its preservation.47

B. History of Mineral Resources in Antarctica

Beyond its scientific value, Antarctica has the potential to become a commercial resource as well.48 Geological evidence suggests that Ant-

32 See Joyner, supra note 1, at 61.
33 See id. at 247; Myhre, supra note 8, at 113.
34 See G.A. Res. 45/78, Preamble, U.N. Doc. A/RES/45/78 (Dec. 12, 1990) (“Welcoming the initiative taken by some Antarctic Treaty Consultative Parties in promoting Antarctica as a nature reserve or world park and the banning of prospecting and mining in and around Antarctica . . . .”).
36 See id.
37 Joyner & Theis, supra note 9, at 139; see Jorge Berguno, The Antarctic Park: The Issue of Environmental Protection, in The Antarctic Environment and International Law, supra note 26, at 106.
38 See Joyner, supra note 1, at 175; Peterson, supra note 13, at 118.
arctica may contain vast stores of oil. The U.S. economy is particularly dependent upon this resource. The Antarctic Treaty was silent on how to treat the discovery of mineral resources such as oil for the same reason it was silent on solving the sovereignty issue—the conflicts over how to resolve both issues were too difficult to tackle in the Cold War political climate. The fragile status of competing sovereignty claims would complicate resolution of the mineral resource issue, since interests could easily overlap or collide. Historically, it has not been commercially viable to search for these resources in Antarctica due to the climatic conditions and the current perception that the chance of discovery is slight. Scientific studies on the continent, however, could incidentally unearth discoveries of commercial value. If a mineral resource were discovered in a particular area, it seems very likely that a country that had shelved its sovereignty claim to that area in 1959 might attempt to reassert its claim.

C. Underlying Issues: Politics and Science

Of the seven claimed areas of Antarctica, only the territorial claims of Britain, Argentina, and Chile overlap. While the other four claims do not overlap, the Antarctic areas in which Britain, Argentina, and Chile made competing claims cover one fifth of the Antarctic continent. During the 1940s and 1950s, these overlapping areas created tension and led countries like the United States to fear that the dispute could give rise to war. Signs pointed in that direction. A few war-like

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49 See Joyner & Theis, supra note 9, at 136. But see Larminie, supra note 24, at 86 (explaining that Antarctica does not have great petroleum potential in comparison to other areas of the world).
50 See Suter, supra note 3, at 1.
51 Beeby, supra note 10, at 5; Sahurie, supra note 6, at 433.
52 Joyner & Theis, supra note 9, at 35.
53 Larminie, supra note 24, at 82 (explaining that mineral resource exploration in Antarctica is prohibitively expensive); Myhre, supra note 8, at 27 (explaining that the United States believed at the time the Treaty was negotiated that the economic value of Antarctica was negligible).
54 Beeby, supra note 10, at 8 (explaining that it will always be rumored that science is merely a cover for “other national ambitions”). See generally Sahurie, supra note 6, at 352–56 (relying on the implicit assumption that the status of these mineral resources has been discovered through scientific inquiry).
55 See Peterson, supra note 13, at 2.
56 Suter, supra note 3, at 16.
57 Myhre, supra note 8, at 14.
58 See Beeby, supra note 10, at 5.
scuffles occurred in the southern hemisphere among the three claimant states from 1947–48. From a political standpoint, the United States became concerned that it would need to choose sides. All three of the countries were U.S. allies, and the United States did not want to make a choice between friends.

Antarctica was also a site of Cold War political strain. Both the United States and the Soviet Union established bases on Antarctica for various pursuits. To strengthen its presence in Antarctica, the United States began to train military personnel and test equipment in Antarctic conditions in 1946–47. The United States was not the only country that was feeling insecure about the military status of Antarctica. Australia, for example, was fearful of the Soviet Union’s increasing presence in Antarctica, especially after Soviet scientists raised the Soviet flag over a scientific base established in a part of Australia’s Antarctic claim. The action of the Soviet scientists did not concern the scientists in Antarctica, but it did concern political leaders. Actions in Antarctica by any country were watched with a wary eye by countries on both sides of Cold War politics, even those actions conducted under the auspices of scientific exploration.

Despite these political insecurities, scientists were working to peacefully unite the world through a cooperative research program called the International Geophysical Year (IGY). This program lasted eighteen months, from July 1, 1957 until December 31, 1958. The program consisted of a coordinated effort among scientists to study the entire natural world. Because of its success, the program was extended an additional year, although its name changed to International Geophysical Cooperation (IGC)-1959. In Antarctica, the activities of

59 See Myhre, supra note 8, at 14.
60 See id.; see, e.g., Suter, supra note 3, at 17.
61 See Joyner & Theis, supra note 9, at 149–50.
62 See id.; Peterson, supra note 13, at 54.
63 Beeby, supra note 10, at 5.
64 See Lorraine M. Elliott, International Environmental Politics 28 (1994); Myhre, supra note 8, at 31.
65 Elliott, supra note 64, at 28.
66 See Myhre, supra note 8, at 31.
67 Id.; see Suter, supra note 3, at 18.
68 See Suter, supra note 3, at 18.
69 See Peterson, supra note 13, at 68.
70 Suter, supra note 3, at 18.
71 Id.
72 Id.
73 Myhre, supra note 8, at 31.
scientists participating in the IGY took place at fifty different scientific bases, and were conducted by twelve different countries. Out of this background of political fears and scientific aspirations, the Antarctic Treaty of 1959 took shape.

D. The Antarctic Treaty and Its Progeny

The United States initiated the Antarctic Treaty by inviting the eleven other interested countries to Washington, D.C. to discuss the matter. The Antarctic Treaty articulated three main goals: first, to promote peace in Antarctica; second, to ensure that Antarctica would not be used for military activity; third, to encourage scientific research in Antarctica. The first two goals stemmed from sovereignty conflicts and Cold War concerns. Peace was important to all Treaty members because none wanted to go to war over the conflicting sovereignty claims. Antarctica also appeared to be a potential site for another Cold War arms race. The United States feared that the Soviet Union would use Antarctica for military purposes. Fortunately, the third goal, of encouraging scientific research, facilitated peace and demilitarization because it would benefit all Treaty parties; the immeasurable benefits of scientific inquiry paved the way for political compromise.

Since its creation, the Antarctic Treaty has evolved to include twenty-six Consultative parties and seventeen Contracting parties. The difference between Consultative and Contracting party status is slight, but significant. The twelve original treaty parties were all granted Consultative party status by the Treaty. Under Article IX, these nations can attend yearly meetings and can vote on policies relating to

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74 Suter, supra note 3, at 18.
75 Myhre, supra note 8, at 31–32.
76 Peterson, supra note 13, at 40.
77 Antarctic Treaty, supra note 10, arts. I–III.
78 See Joyner & Theis, supra note 9, at 146.
79 See Trolle-Anderson, supra note 12, at 60.
80 See Joyner & Theis, supra note 9, at 150.
81 Id. at 26.
82 See Jonathan I. Charney, The Antarctic System and Customary International Law, in International Law for Antarctica 51, 91 (Francesco Francioni & Tullio Scovazzi eds., 1996) (describing the Treaty as a quid pro quo with claimant-states agreeing to suspend claims for the benefit of a cooperative agreement); Trolle-Anderson, supra note 12, at 59–60.
83 Joyner, supra note 1, at 49.
84 See id. (noting that Consultative parties can attend meetings and vote on Antarctic issues, while Contracting parties cannot).
85 Antarctic Treaty, supra note 10, art. IX(1); Sahurie, supra note 6, at 11.
Antarctica at those meetings. Article XIII articulates the procedure whereby other nations can become Treaty members. For a nation that ratifies the Treaty to achieve Consultative party status, it must “conduct[ ] substantial scientific research activity [in Antarctica].” This requirement indirectly imposes an investment requirement as well. Given its location and climatic conditions, conducting research on Antarctica is expensive. This requirement effectively prohibits developing countries from voting on Antarctic issues, since they cannot meet the monetary demand inherent in Consultative party status. A lesser status, however, can be attained by an interested nation that simply ratifies the Treaty but does not meet the scientific research requirement. This Contracting party status obliges a nation to follow the Antarctic Treaty, but does not allow the nation any voice in Antarctic governance. Seventeen nations have chosen this status, but it is questionable whether that status was a “choice,” or dictated by monetary constraints.

The Antarctic Treaty expanded to include Recommendations and policies adopted at yearly meetings, conducted as per the original Treaty articles. Thus, the Treaty became more than just a Treaty, and is often referred to now as the Antarctic Treaty System (ATS). Special conferences were held over the years to develop various Protocols, some of which the Consultative parties eventually ratified. So long as all Consultative parties ratify a protocol, these measures become part of the ATS. Adopted measures have no force until ratified.

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86 Antarctic Treaty, supra note 10, art. IX(1); Sahurie, supra note 6, at 11.
87 Antarctic Treaty, supra note 10, art. XIII.
88 See id. art. IX(2); Peterson, supra note 13, at 43.
89 Joyner, supra note 1, at 48.
90 Id.; see Sahurie, supra note 6, at 9 (describing the U.S. budget in Antarctica).
92 See Myhre, supra note 8, at 39; Suter, supra note 3, at 23.
93 See Peterson, supra note 13, at 100–01.
94 Joyner, supra note 1, at 49.
95 See Peterson, supra note 13, at 101.
97 See generally Overview, supra note 39, at 35–39.
99 See Sahurie, supra note 6, at 11 (explaining the consensus requirement).
The first successful, large-scale addition to the Antarctic Treaty was the 1964 Agreed Measures for the Conservation of Antarctic Flora and Fauna.\(^\text{101}\) Next came the 1972 Convention for the Conservation of Antarctic Seals (Seals Convention).\(^\text{102}\) After the Seals Convention entered into force in 1978, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) was discussed in 1980 and was ratified in 1982.\(^\text{103}\)

E. CRAMRA and the Madrid Protocol

The Convention on the Regulation of Antarctic Mineral Resources (CRAMRA) took six years to finalize.\(^\text{104}\) Discussions and meetings occurred from 1982–88 and a special Consultative meeting adopted the convention on December 2, 1988 in Wellington, New Zealand.\(^\text{105}\) The agreement—the first of its kind—delineated a plan for handling the mining of mineral resources in Antarctica.\(^\text{106}\) It was never ratified.\(^\text{107}\) Consensus among Treaty members is required for measures to become effective.\(^\text{108}\) France and Australia pulled back their support for environmental reasons, thereby preventing CRAMRA from becoming part of the ATS.\(^\text{109}\)

Three years later, in 1991, the Consultative parties negotiated the Protocol to the Antarctic Treaty on Environmental Protection, referred to as the Madrid Protocol.\(^\text{110}\) This Protocol places a fifty-year moratorium on mining for mineral resources in Antarctica.\(^\text{111}\) The Madrid Protocol reflects an entirely different assessment of mineral resources

\(^{100}\) See id.


\(^{103}\) Elliott, supra note 64, at 91; see generally CCAMLR, supra note 48.

\(^{104}\) Joyner & Theis, supra note 9, at 108. See generally CRAMRA, supra note 48.

\(^{105}\) Joyner & Theis, supra note 9, at 108. See generally CRAMRA, supra note 48.

\(^{106}\) See Suter, supra note 3, at 59–60.

\(^{107}\) See id. at 59.

\(^{108}\) Sahurie, supra note 6, at 11.

\(^{109}\) See Joyner & Theis, supra note 9, at 77.

\(^{110}\) Madrid Protocol, supra note 98; Joyner & Theis, supra note 9, at 179.

\(^{111}\) Joyner & Theis, supra note 9, at 180; Francesco Francioni, Introduction, in International Law For Antarctica, supra note 82, at 3.
and the environment. Rather than regulate mining to protect the environment, which CRAMRA tried to do, the Madrid Protocol outright prohibits mining. The ban, however, is not permanent. The Protocol can be amended to lift the mining ban with majority vote by the current Consultative parties within the fifty years immediately following January 14, 1998. After the fifty years expire, the ban can be lifted by a majority of current Consultative parties. While mining is currently prohibited, mining could take place in Antarctica in the future if Treaty parties change their positions.

F. The ATS and the United Nations

The U.N. would like to play a greater role in Antarctic policy, but the ATS has yet to include it. The twelve initial Treaty parties actually preferred that the system function independent of the U.N. Since the ATS involved exchanging frozen claims for benefits of a unified system, those frozen claims could be threatened if the U.N. took over with its system. Under the ATS, only those nations with a “stake” in Antarctica have a voice in Antarctic policy. The requirement of “substantial scientific research” in Antarctica serves to limit the group of nations that can take part in Antarctic policy-making. In a way, the smaller scale of this governing system has facilitated the many recommendations and policies that the ATS has developed over the years. If it were easier to attain Consultative party status, it would be more difficult for the entire group to achieve consensus on matters.

112 Madrid Protocol, supra note 98, art. 3(1); Davor Vidas, The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the Protocol, in Governing the Antarctic, supra note 39, at 77 [hereinafter New Dimension].
113 New Dimension, supra note 112, at 77.
114 Joyner, supra note 1, at 153.
116 Joyner & Theis, supra note 9, at 180.
117 See Charney, supra note 82, at 89.
118 G.A. Res. 45/78, supra note 43; see Hussain, supra note 91, at 89, 91.
119 See Elliott, supra note 64, at 39.
120 See Charney, supra note 82, at 91–92.
121 See Joyner & Theis, supra note 9, at 175.
122 See id. at 174–75.
123 See id.
124 See id. at 175.
The significant barrier to Consultative status has not stopped developing countries that are members of the U.N. from utilizing the U.N. as a stage to discuss their Antarctic concerns.\textsuperscript{125} The U.N. General Assembly has issued various resolutions over the years pertaining to Antarctica.\textsuperscript{126} These resolutions reflect a concern that even though scientific research in Antarctica might be cost-prohibitive for some nations, all nations have a stake in the global environment.\textsuperscript{127} Insofar as research and other activities in Antarctica could affect the global climate, oceans, and ozone, every nation has a stake.\textsuperscript{128} A December 1990 G.A. Resolution recognizes “the particular significance of Antarctica to the international community in terms, inter alia, of international peace and security, environment, its effects on global climatic conditions, economy and scientific research . . . .”\textsuperscript{129} Attempts to utilize the U.N. paid off for those nations that thought their voices were not being heard.\textsuperscript{130} After the U.N. made Antarctica a talking point in the early 1980s, the non-Consultative parties were granted access to regular and special Consultative meetings.\textsuperscript{131} U.N. power, however, is limited.\textsuperscript{132} Although the U.N. Security Council could issue binding resolutions pertaining to Antarctica, as opposed to the observational General Assembly resolutions, Consultative parties in the U.N. could easily exercise a veto.\textsuperscript{133} A transfer of power from the ATS to the U.N. would not sit well with Consultative parties, thus the veto would probably be exercised.\textsuperscript{134}

\textsuperscript{125} See Suter, supra note 3, at 78–86 (discussing U.N. Resolutions from developing countries regarding Antarctica).
\textsuperscript{126} See id.
\textsuperscript{127} See, e.g., G.A. Res. 46/41, pmbl., U.N. Doc. A/RES/46/41 (Dec. 6, 1991) (“Welcoming the increasing recognition of the significant impact that Antarctica exerts on the global environment and ecosystems and of the need for a comprehensive agreement to be negotiated by the international community . . . .”).
\textsuperscript{128} See id. pmbl.
\textsuperscript{129} See G.A. Res. 45/78, supra note 43.
\textsuperscript{130} See Beeby, supra note 10, at 15.
\textsuperscript{131} See id.
\textsuperscript{132} See Myhre, supra note 8, at 115.
\textsuperscript{133} See id.
\textsuperscript{134} See id.
II. Discussion

A. Theories of Title

Claimant states asserted title to Antarctica using a variety of title-acquisition theories. Under international law, however, there is only one manner by which a country may obtain title to Antarctica. Since Antarctica is uninhabited terrain, a country can only acquire title to it by occupation. When occupation is unrealistic or impossible, the mere will to act as sovereign will suffice. The inquiry concerning when occupation becomes “unrealistic or impossible” is highly fact-specific. It is disputed whether any country has effectively “occupied” Antarctica to justify a claim to sovereignty, yet claims began to surface at the beginning of the twentieth century.

B. Conflicting Theories of Contested Antarctic Territory

Great Britain’s claim was based on inchoate title through discovery, and the perfection of this title through occupation of its scientific bases on Antarctica. Great Britain also utilizes the sector theory to expand its claim beyond the scientific bases it occupies. Under the sector theory, claimants can claim larger areas than they occupy based on proximity. Utilizing coastlines and the meridians, claimants will outline their particular “sector,” extending beyond an area they actually occupy. International law has not validated the sector theory as a legitimate way to acquire title to land. Nonetheless, Great Britain along with Argentina, Australia, Chile, France, and New Zealand all use the theory to claim additional areas. In fact, Norway is the only country of the seven claimant countries to reject this theory.

135 See generally id. at 7–15.
136 Id. at 8.
137 See Joyner, supra note 1, at 19.
138 Myhre, supra note 8, at 11.
139 See id. at 8–11 (outlining three precedential cases that have left the question of how to evince sovereignty in Antarctica unanswered).
140 Suter, supra note 3, at 16.
141 Myhre, supra note 8, at 14.
142 See id.
143 See Sahurie, supra note 6, at 314 (explaining the sector theory in detail).
144 See id.
145 Myhre, supra note 8, at 12.
146 See id.
147 Id. at 15.
Argentina’s claimed area includes the Antarctic Peninsula, an area within Great Britain’s claim that is known for its mineral resource potential.\(^{148}\) In addition to a claim based on occupation, Argentina backed its claim with geographical proximity, referred to as “contiguity,” and geographical affinity.\(^{149}\) Neither of these theories are recognized in international law.\(^{150}\) The contiguity theory, if recognized, would require the territories of Argentina and Antarctica to be connected.\(^{151}\) The 700-mile distance between Argentina and the claimed territory is hardly “contiguous.”\(^{152}\) The geographical affinity theory is perhaps even more far-fetched.\(^{153}\) This theory proposes that the Andes submerge at a certain point in Argentina and then resurface in the south as the Antarctic Peninsula.\(^{154}\) Thus, even if not contiguous to the naked eye, the lands are still connected by their likeness to one another.\(^{155}\)

Not until 1940 did Chile officially declare the outlines of the Chilean Antarctic Territory.\(^{156}\) The decree did not establish new titles, but rather acknowledged pre-existing rights in the area.\(^{157}\) Chile then established a scientific base in the South Shetland Islands in 1947, an area within Argentina’s and Great Britain’s claims.\(^{158}\) Great Britain tried to resolve the issue through international arbitration, but Chile refused the court’s jurisdiction.\(^{159}\) The Antarctic Treaty effectively took the heat off these disputes and froze the claims.\(^{160}\) Although this did not resolve the underlying disputes, it ensured peace in Antarctica.\(^{161}\)

C. The Mineral Resource Issue

There are two issues relating to mineral resources in Antarctica: first, whether they exist; and second, whether it is economically viable to extract them.\(^{162}\) The Gondwanaland hypothesis supports the idea

\(^{148}\) Sahurie, supra note 6, at 19.
\(^{149}\) Elliott, supra note 64, at 27.
\(^{150}\) See Joyner, supra note 1, at 19; Myhre, supra note 8, at 13.
\(^{151}\) See Joyner, supra note 1, at 19.
\(^{152}\) See Myhre, supra note 8, at 13.
\(^{153}\) See Joyner, supra note 1, at 19.
\(^{154}\) Id.
\(^{155}\) See id.
\(^{156}\) Sahurie, supra note 6, at 23.
\(^{157}\) Id.
\(^{158}\) See id.
\(^{159}\) See id.
\(^{160}\) See Trolle-Anderson, supra note 12, at 60.
\(^{161}\) See id.
\(^{162}\) See Suter, supra note 3, at 48.
that mineral resources exist in Antarctica. Based on this concept, Antarctica used to be part of a larger land mass. Thousands of years ago this larger land mass broke apart, into the seven respective continents. Since mineral resources have been found on the other continents, the hypothesis suggests that Antarctica contains mineral resources as well. Deposits of coal and iron have been found in Antarctica, supporting the hypothesis. Even though it is likely mineral resources exist in Antarctica, their extraction is an entirely different matter.

Extraction of mineral resources in Antarctica can be reduced to simple economic cost-benefit analyses. Antarctica’s location and climatic conditions contribute to high projected extraction costs. Studies suggest, however, that the deposits in Antarctica could be quite large, thereby making extraction profitable. The demand for such resources in the market is another factor in this analysis. High demand could increase prices, thus making the extraction more profitable. These variables are all subject to change based on fluctuations in the market for certain mineral resources, especially oil, as well as changing technologies that facilitate extraction in the harsh Antarctic climate. With the adoption of the Madrid Protocol, the ATS prohibits mining. Therefore, whether the minerals exist and, if so, how profitable it might be to extract them, is immaterial until some future time when the ban might be lifted.

D. The Common Heritage of Mankind Principle

Some developing nations have argued that Antarctica should be considered the “common heritage of mankind” (CHM). This con-
troversial argument posits that areas that cannot be owned by any nation should be regulated for the benefit of all nations. Even before the theory was discussed in the 1970s, the 1959 Antarctic Treaty reflected its ideals. The preamble “[r]ecogniz[es] that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord” (emphasis added). While the Treaty does not overtly state that Antarctica is owned by all nations, it does resonate with the idea that all nations have an “interest” in Antarctica. The 1991 Madrid Protocol also adopted some of the common heritage principle ideals, but it did not go so far as to officially adopt the common heritage principle. The Protocol does, however, “designate Antarctica as a natural reserve, devoted to peace and science.” The U.N. alluded to the principle in a 1991 General Assembly Resolution which “[a]ffirm[ed] its conviction that, in the interest of all mankind, Antarctica should continue for ever to be used exclusively for peaceful purposes and that it should not become the scene or object of international discord . . . .” If applied in Antarctica, the principle would require that the world community obtain ownership rights, including mineral resource rights, in Antarctica. Any country choosing to exploit Antarctica’s mineral resources would have to share its profits with the entire world. The only official adoption of the CHM principle was in the 1982 United Nations Convention on the Law of the Sea, which applied to the deep-sea bed. Therefore, whether CHM is an international standard is highly debatable, since it has only been applied in one context thus far, and in that context it was considered a failure. The ATS, which evokes the CHM with its language regarding the “interest of all mankind,” does not expressly

178 See Sahurie, supra note 6, at 369.
179 See Peterson, supra note 13, at 119.
180 See Charney, supra note 82, at 80.
181 Antarctic Treaty, supra note 10, pmbl. (emphasis added); see Beeby, supra note 10, at 5.
182 See Antarctic Treaty, supra note 10, pmbl.
183 See Madrid Protocol, supra note 98, art. II.
184 Id.
185 G.A. Res. 46/41, supra note 127, pmbl.
186 See Joyner & Theis, supra note 9, at 168.
187 Id.
189 Sahurie, supra note 6, at 443.
invoke its attendant consequences: shared profits from mineral resources in Antarctica.\textsuperscript{190}

E. Designation of Antarctica as a “Global Commons”

The ATS is recognized for its novel approach to a global commons area.\textsuperscript{191} The System has even served as a model for other international “commons”, such as Outer Space.\textsuperscript{192} There are six characteristics of “global commons”:

(1) The area is physically and legally situated beyond the limits of national jurisdiction. (2) There are no recognized or valid national sovereignty claims that pertain to the area. (3) The area is presumed to be indivisible, and not politically enclosable . . . . (4) . . . universal access to the area. (5) The effects of abuse or mismanagement of the area are experienced universally . . . . (6) The risk to the commons area increases when states or their nationals conduct activities there.\textsuperscript{193}

A main problem in defining Antarctica as a “global commons” concerns the second characteristic.\textsuperscript{194} If one looks at how Antarctica is treated, then it is not a “global commons” since some countries have sought to claim it, and some reserve the right to claim it in the future.\textsuperscript{195} Since the Treaty freezes the territorial claims, however, Antarctica is treated as if no nation owns it.\textsuperscript{196}

The 1980 World Conservation Strategy mentioned Antarctica and its status as a “global commons” in its efforts to ensure that economic development is coupled with sound conservation practices.\textsuperscript{197} It defined a “global commons” as “parts of the earth’s surface beyond national jurisdictions—notably the open ocean and the living resources

\textsuperscript{190} See Charney, supra note 82, at 80; Sahurie, supra note 6, at 441.

\textsuperscript{191} See Joyner & Theis, supra note 9, at 33–34; Triggs, supra note 37, at 54–55 (highlighting the unique features of the ATS, including the fact that Antarctica is the first nuclear-free zone in the world).

\textsuperscript{192} See generally Rosanna Sattler, Transporting a Legal System for Property Rights: From the Earth to the Stars, 6 Chi. J. Int’l L. 23 (2005).

\textsuperscript{193} Joyner, supra note 1, at 30.

\textsuperscript{194} See id. at 19, 30.

\textsuperscript{195} See id.; Suter, supra note 3, at 16 (explaining that the United States and Russia have reserved the right to claim Antarctica).

\textsuperscript{196} See Joyner, supra note 1, at 47.

\textsuperscript{197} See Suter, supra note 3, at 113.
found there—or held in common—notably the atmosphere.”

Policymakers are primarily concerned with global commons spaces because of the potential for humans to exploit the resources in those spaces to the detriment of the global environment. Economic benefits, therefore, are more the hallmark of CHM than they are of the “global commons” theories.

F. Status of Antarctica as a “World Park”

Non-governmental organizations (NGOs) and the U.N. endorse the idea that Antarctica should be a world park. In a 1991 General Assembly Resolution, the U.N. alluded to some Consultative parties that share in this view by “[w]elcoming the increasing support, including by some Antarctic Treaty Consultative Parties, for the establishment of Antarctica as a nature reserve or world park to ensure the protection and conservation of its environment and its dependent and associated ecosystems for the benefit of all mankind.” While the world park view incorporates many of the ideas already practiced in Antarctica, such as the promotion of science and peace, the thrust of the world park concept is the environment.

Greenpeace has been very active in advertising its belief that Antarctica should be designated a world park. Looking at the values it sets forth in achieving this agenda helps elucidate the characteristics of a world park. Greenpeace promotes four principles pertaining to Antarctica. All four principles echo the current status of the ATS policy in Antarctica. The first Greenpeace principle makes the environment of paramount concern; the second advocates “complete protection of Antarctica’s wildlife”; the third wishes Antarctica to remain “a zone of international scientific co-operation”; and the fourth wishes Antarctica to remain peaceful and weapon-free.

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198 See id. at 114.
199 See id. at 115.
201 Peterson, supra note 13, at 118; G.A. Res. 45/78, supra note 43, pmbl.
202 G.A. Res. 46/41, supra note 127, pmbl.
203 See Berguno, supra note 46, at 106.
204 See Joyner & Theis, supra note 9, at 128.
205 See id. at 128–29.
206 Suter, supra note 3, at 134–35.
207 See id.
208 Id.
The recent Madrid Protocol embodies the first principle, since it creates an environmental protocol that effectively sublimates all other interests to those of the environment.\footnote{See Madrid Protocol, supra note 98, pmbl., art. 3(1).} The second principle was already accomplished in CCAMLR, as well as the Seals Convention.\footnote{See Joyner, supra note 1, at 177–78. See generally CCAMLR, supra note 98; Seals Convention, supra note 102.} The third and fourth principles were addressed even before Greenpeace began advocating its view that Antarctica should be a world park—the Treaty itself adopts peace and demilitarization as two of its goals.\footnote{See Antarctic Treaty, supra note 10, arts. I–III.}

III. Analysis

A. Eliminating Territorial Claims

At a point when no particular nation stands to gain from exploitation of mineral resources in areas of Antarctica, Consultative Treaty parties should eliminate all claims and potential claims to sovereignty over Antarctica.\footnote{See Sahurie, supra note 6, at 303 (highlighting the precarious situation created by Article IV).} As it stands now, under the Madrid Protocol of 1991, mining in Antarctica is banned until 2048.\footnote{See Madrid Protocol, supra note 98, art. 7; see also Entry Into Force, supra note 115.} Nonetheless, Treaty parties have never attempted to eliminate the various types of territorial claims that exist in Antarctica.\footnote{See Sahurie, supra note 6, at 302–3.}

On the one hand, the freezing of territorial claims binds the entire ATS system together.\footnote{See Joyner & Theis, supra note 9, at 31.} Unfortunately, as a result, all future compromises, recommendations, and protocols are predicated on that one, initial compromise.\footnote{See Beeby, supra note 10, at 7.} The Treaty’s goals of peace and scientific research, however, are not related to territorial claims to Antarctica, except insofar as they were politically bartered for one another.\footnote{See Trolle-Anderson, supra note 12, at 59–60.} These meaningless territorial claims should not continue to underlie current and future Antarctic measures.\footnote{See id.}
B. Obstacles to Melting the Territorial Claims

One explanation for the perpetuation of these claims is that change is hard to effectuate in a consensus-only environment. One important reason for Consultative parties to relinquish claims over Antarctica is because those claims thwart the creation of Antarctic policy. The failure of CRAMRA highlights this roadblock to policy-making. Making it even more difficult to reach consensus, Consultative parties are those that can afford scientific research in Antarctica and therefore have no reason to entertain the viewpoints of those that cannot. These nations can also afford the steep costs of mineral extraction in the harsh Antarctic conditions. Consultative parties, then, are adamantly against the application of CHM to Antarctica. The CHM principle demands that countries that can afford to do the work of mineral extraction also distribute the profits of any potential discoveries to countries that cannot. Since countries with claims have no incentive to share the resources, they are essentially hoarding their frozen claims for the possibility that mineral resources will be discovered in the future. By eliminating the incentive to hoard the frozen territorial claims, policymaking in Antarctica would be improved.

1. CHM

Despite the faults of the current system, the CHM does not adequately address the Antarctica situation. The CHM principle is problematic not only for countries with claims, but for those without claims as well. For example, as it has been implemented in the past, the CHM does not give enough deference to environmental concerns. Instead, it focuses on sharing the benefits of mineral resources that exist in areas beyond national jurisdiction. When preservation of the environment has become a paramount concern in Antarctica, as evi-

219 See Sahurie, supra note 6, at 11.
221 See id.
222 See Hussain, supra note 91, at 91.
223 See Sahurie, supra note 6, at 428; Suter, supra note 3, at 48.
224 See Joyner & Theis, supra note 9, at 172.
225 See id.
226 See id.
227 See id.
228 See Charney, supra note 82, at 80.
229 See Joyner, supra note 1, at 224; infra Part III.B.
230 See Joyner, supra note 1, at 224.
231 See id. at 226.
denced by the Madrid Protocol and its ban on mining, CHM ceases to be helpful.232

2. World Park

Transforming Antarctica into a world park would not serve the interests of the ATS.233 On the one hand, some Consultative parties are open to Antarctica being made into a world park.234 One benefit of this internal movement towards world park status is that such status would necessarily render the territorial claims moot.235

One problem, however, with officially transforming Antarctica into a world park is that it could limit scientific studies on the continent, such as the CCAMLR Ecosystem Monetary Program (CEMP).236 The current position created by the ATS strikes a healthy balance between protecting the environment and allowing Antarctica to be utilized for scientific knowledge.237 Changing Antarctica into a world park would thus not mesh with the goal of the Antarctic Treaty that relates to scientific research.238 The Consultative parties can, however, continue with the environmental protection scheme of the Madrid Protocol to ensure the protection of the Antarctic environment and, instead of declaring it a world park, just agree to drop the territorial claims.239

3. Clinging to Claims

Another problem with convincing Consultative parties to drop their territorial claims is that they have repeatedly articulated their interest in holding onto those claims.240 For example, the Recommendations issued by the Consultative parties in 1977 and 1981 emphasized the continuance of Article IV, which suspended the resolution of all claims to sovereignty until an unspecified future date.241 Specifically,

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232 See Madrid Protocol, supra note 98, pmbl., art. VII; Joyner, supra note 1, at 225 (mentioning that the CHM can impose environmental costs).
233 Joyner, supra note 1, at 174–75.
234 See G.A. Res. 46/41, supra note 127, pmbl.
235 See Joyner & Theis, supra note 9, at 31.
236 See Joyner, supra note 1, at 129, 174.
237 See id. at 174–75.
238 See id. at 174.
239 See id.
Recommendation IX-1 expressly stated a desire to ensure that “the provisions of Article IV of the Antarctic Treaty shall not be affected by [a future mineral resources regime].”242 In light of CRAMRA’s failure and the subsequent adoption of the Madrid Protocol with its fifty year ban on mining, the relevancy of all frozen claims is uncertain.243 Especially when either consensus or a majority is required to *lift* the ban, the status quo seems to be that no one will be able to profit from a mineral resource being discovered within a latent territorial claim.244 Because the system holds these claims in perpetual stasis, the claims these nations hold are essentially valueless.245 Therefore, these claims should be dropped.246

C. Additional Considerations

One major drawback of a proposal to drop all territorial claims is that it could cause the ATS to collapse.247 Nonetheless, the flow of political pressure and the resulting Protocols have evidenced a paramount concern for the environment above any economic concerns.248 The timing, therefore, seems ripe for such a change in the ATS.249

In addition, the elimination of territorial claims may or may not implicate increased U.N. involvement.250 After the Madrid Protocol, nations advocating the CHM principle were less interested in Antarctica, since it seemed like there was no potential for resources to be exploited there.251 Similarly, Consultative parties with claims or potential claims might lose interest in maintaining an independent system given the loss of the latent territorial claims.252 On the other hand, seventeen nations were interested in becoming Contracting parties, which suggests some advantage to having the ATS function independent of the U.N.253

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244 See Charney, *supra* note 82, at 89.
246 See *id*.
247 See Peterson, *supra* note 13, at 2 (noting the instability of the ATS).
248 See Charney, *supra* note 82, at 89–90.
249 See *id*.
250 See Myhre, *supra* note 8, at 117.
253 See Joyner, *supra* note 1, at 49.
If the ATS breaks down over Article IV disputes, the outcome of the Article IV compromise would be uncertain. The status of Antarctica—claimed, claimable, or unclaimable—would be up in the air. For this reason, the ATS should adapt itself before mineral resources are discovered. If Article IV were eliminated, there would no longer be certainty if the system were to cease. Eliminating Article IV would effectively make Antarctica an unclaimable, global commons space.

D. The Solution of Meltdown

With the elimination of Article IV, the revised Treaty would facilitate agreements concerning Antarctica’s resources that truly are for the benefit of all nations. The 1959 Antarctic Treaty has as its preeminent goals maintaining peace and the furtherance of scientific research in Antarctica and those goals should be reflected in all Antarctic policies. Article IV, by setting aside territorial claims to the area, contradicts the goals of the Treaty by giving certain nations an incentive to maintain possible territorial claims. Article IV prevents Antarctica from truly achieving “global commons” status, since it is held for the benefit of all, but also potentially for the benefit of just a few nations with territorial claims.

This solution revises the CHM principle. Rather than give every country an equal share of potential mineral resources profits in Antarctica, it gives all countries the greater benefit of preserving Antarctica for scientific and environmental benefit for years to come. The focus, therefore, is less on monetary value, which is locked up anyway by the Madrid Protocol, and more on aesthetic and scientific value, which everyone can share without cost to another. By denying claimant countries their territorial claims, everyone benefits from

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254 See Sahurie, supra note 6, at 303.
255 See id. at 304.
256 See Peterson, supra note 13, at 2.
257 See id.
258 See Joyner, supra note 1, at 19.
259 See Sahurie, supra note 6, at 444.
260 Antarctic Treaty, supra note 10, arts. I–III.
261 See Triggs, supra note 37, at 53 (describing sovereignty as a “trump card” in negotiations).
262 See Joyner, supra note 1, at 44–47, 50.
263 See id. at 32–34.
264 See id. at 32–34.
265 See id. at 49.
the certainty of Antarctica’s continuance as a site of peace and scientific study.\textsuperscript{266}

**Conclusion**

Setting territorial claims aside worked to create an initial agreement on Antarctica, but it will not sustain sound future agreements. The international climate has changed and the environment has become more important than disputed territorial claims. Facilitated by the absence of territorial claims, the past fifty years have seen Antarctica become a peaceful and science-oriented international environment. The complete eradication of claims would guarantee that Antarctica stays peaceful and scientifically viable for years to come.

In the wake of CRAMRA’s failure and the Madrid Protocol’s success, it is evident that countries consider environmental issues to be of paramount concern in Antarctica. While granting Antarctica world park status could further that interest, it would contradict a very fundamental goal of the Antarctic Treaty: scientific research. Rather than declare Antarctica a world park, Treaty parties should eliminate the latent territorial claims in Article IV. While Antarctica has been treated as if it is a global commons, this would truly make Antarctica into a global commons space by removing any possibility of its ownership by a single nation.

With frozen territorial claims melted, the ATS would be in a position unlike one it has ever been in before. The frozen territorial claims were a barter chip for the incredible benefits of peace and scientific cooperation that stemmed from the 1959 Treaty. But the ATS should not be chained by its beginnings, only inspired by them. With national interests in Antarctic territory gone, the question of what to do with Antarctic mineral resources (if discovered) can be answered from a more global, equitable perspective.

\textsuperscript{266} *Id.* at 49; see Madrid Protocol, supra note 98, pmbl.
MONEY TALKS: PUTTING THE BITE IN PARTICIPATORY RIGHTS THROUGH INTERNATIONAL FINANCIAL ASSISTANCE

Daniel Navisky*

Abstract: Democratic elections are one of the foundational elements of a stable, healthy, and vibrant modern state. Current treaty law guarantees four basic participatory rights: periodic and regular elections, universal suffrage, secret ballots, and non-discrimination. Those rights are bolstered further through United Nations election monitoring and state practice. This Note argues that more must be done to guarantee true participatory rights in emerging and lesser developed nations. In particular, it proposes attaching conditions to World Bank funding that require adherence to the rights guaranteed under global and regional treaty law and the customary practice of states and international actors. In order to accomplish this goal, compliance with those conditions should be measured through United Nations monitoring reports.

Introduction

“Elections do not democracy make. They are, however, the lynchpin of the democratic process.”¹ Those were the comments of the Organization for Security and Cooperation in Europe (OSCE) Parliamentary Assembly President and Special Coordinator for the observers of elections in Belarus in March 2006.² The OSCE and its election observers criticized the election due to “harassment and arrests of opposition candidates, propagandistic coverage on state media and extensive irregularities in the counting of ballots.”³

In nations with strong democratic traditions, the pendulum of governmental control constantly swings back and forth, temporarily resting in one ideological camp or the other, and often somewhere in

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² Id.

Disenchanted voters rest easily knowing that the domestic legal framework affords them another opportunity in only a few short years to pass judgment and change course. While there may be calls for reform in the interim, the democratic system itself is fundamentally the safeguard against excessive abuse.

This is not so in emerging and developing nations. There, the likelihood of free and fair elections in the future is much less certain. Relying on unstable domestic systems to guarantee future plebiscites is tenuous at best. And yet, those who defend the sovereign rights of nations at all costs argue against international involvement in elections, even though they are fully aware that fair elections might not be possible.

The Belarus election is illustrative. President Aleksandr G. Lukashenko officially won by a wide margin, garnering eighty-three percent of the votes. Like the OSCE, the United States and the European Union also denounced the elections. Both the United States and the E.U. offered only the possibility of a widened visa ban for top Belarus officials to address with that state’s failure to meet minimum elections standards, essentially leaving recourse only to internal forces within Belarus. The disputed nature of the election leaves Lukashenko with what the Council of Europe’s Secretary General, Terry Davis, called “a tainted mandate.” What can the Belarusian people do to rectify the situation? Short of a backlash on the order of the South African experience, what will international pressure accomplish? In theory, international human rights law, based on treaty and custom, guarantees future

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5 See id.
6 See id.
8 See id.
9 See id.
10 See id. at 590–91.
12 See id.
election rights. But the lack of adequate enforcement measures to achieve those safeguards renders those rights moot.

This Note argues that the best way to ensure compliance with international requirements for democratic elections is to condition international financial assistance for emerging and developing states on fulfillment of international human rights standards for free and fair elections. Part I reviews the history of elections and the manner in which governments have been chosen, including the traditional notions of sovereignty that underpin broad deference to activities within domestic borders.

Part II outlines the development of binding international human rights law with respect to democratic elections and the specific minimum requirements for free and fair elections. First, it describes treaty law, including the primary instrument, the International Covenant on Civil and Political Rights (“ICCPR”), as well as regional treaties in Europe, the Americas, and Africa, followed by a review of the customary practice of states and international actors through election monitoring and individual state elections. Part II concludes with a review of the attachment of non-economic conditions on developing nations by the World Bank and the incorporation of human rights goals in those conditions.

Part III argues that in order to guarantee that developing states adhere to international human rights standards on participatory rights, the World Bank should condition funds, in part, on compliance with these minimum standards based on United Nations (U.N.) election monitoring. Part IV concludes, noting that conditioning funds in this manner would be a concrete move to institutionalizing free and fair elections in the international system.

I. Background and History

According to the latest available information, over 123 countries can be characterized as electoral democracies. But this was not always the case. At the start of the twentieth century, a mere nine countries could boast such a record. Prior to 1948, notions of state sovereignty over domestic affairs precluded human rights from providing a

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15 See infra notes 32–71 and accompanying text.
16 See infra notes 72–80 and accompanying text.
18 Fox, supra note 7, at 540. Fox notes that this low number does not even include the question of suffrage for women which would likely lower it even more. Id.
state’s population any safeguards in this area.\textsuperscript{19} Human rights were not incorporated into international law until the close of World War II as the horrors of that catastrophic period sparked the Nuremberg Trials, the U.N. and its ancillary bodies, and the Universal Declaration of Human Rights.\textsuperscript{20} Thus, prior to 1948, individuals possessed no rights under international law, which afforded rights only to states.\textsuperscript{21} Traditionally, in the international system, recognition by other states demonstrates the legitimacy of states and their governments.\textsuperscript{22} And, a state typically recognizes another state’s government and its representatives without regard to the process by which they were chosen.\textsuperscript{23} Monarch, autocrat, parliament, president—each historically has had legitimacy, no matter the process by which they came to power.\textsuperscript{24} The prevailing method through the nineteenth and the early twentieth centuries was based primarily on de facto control—whoever controlled the population and territory, and thus the government, was the government.\textsuperscript{25} The simplicity of this “absolutist” sovereignty system is self-evident.\textsuperscript{26} In practice, even today states recognize “illegitimate” governments (in the colloquial sense) based on the politics of the day, politics that only occasionally include internal factors such as adherence to human rights.\textsuperscript{27}

The concept of national elections, even in its weakest form, was not a recurring feature internationally until the middle of the nineteenth century.\textsuperscript{28} “Popular” sovereignty—the idea that the legitimacy of a government is based on the implied or actual consent of the citizenry—swirled around as a theory of domestic organization for many years prior to its incorporation into international law.\textsuperscript{29} The Enlightenment writers introduced popular legitimacy long before the rise of

\textsuperscript{19} Id. at 544–45.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 545.
\textsuperscript{22} See Fox, supra note 7, at 546–47.
\textsuperscript{23} Id. at 549.
\textsuperscript{24} Id. at 547–49.
\textsuperscript{25} Id. at 549–50.
\textsuperscript{26} See id.
\textsuperscript{28} Fox, supra note 7, at 546.
\textsuperscript{29} See id. at 547, 550.
international human rights law. But early notions of popular sovereignty were focused primarily on the internal structure and legitimacy of governments rather than international standards for achieving that legitimacy.

II. DISCUSSION OF ISSUES

At present, the participation of citizens in the electoral process has become firmly rooted in international human rights law. The foundation for these rights stems from two sources. First, global and regional treaty law on participatory rights binds individual state signatories. Second, the pattern and practice of election monitoring through the U.N. and the Human Rights Committee, as requested by states, combined with those treaties, creates customary international law binding all states. These two general sources of international law shape the contours of the specific electoral rights.

A. Treaty Law

The Universal Declaration of Human Rights (“Universal Declaration”), adopted by the U.N. General Assembly on December 10, 1948, is the logical starting point for a discussion of treaty law on participatory rights. While non-binding, the Universal Declaration planted the seeds that blossomed into many of the human rights treaties that followed. Article 21 of the Declaration states:

30 Id. at 548.
31 See id. at 550.
33 Fox, supra note 7, at 570, 588.
35 Id. at 279–80.
36 See infra notes 64–71 and accompanying text.
(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 
(2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.\(^{39}\)

This was the first formal declaration of these rights in the international context.\(^ {40}\)

1. International Covenant on Civil and Political Rights

The principles outlined in the Universal Declaration became binding in the principal legal instrument codifying participatory rights: the International Covenant on Civil and Political Rights.\(^ {41}\) Article 25 of the ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [regarding discrimination] and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.\(^ {42}\)

\(^{39}\) Universal Declaration, \textit{supra} note 37, art. 21, at 75. While the Universal Declaration does not have the binding nature of a treaty, it is well established that it has overwhelming support and is so highly regarded that it has become a “customary rule of state obligation.” Franck, \textit{supra} note 38, at 61.

\(^{40}\) Fox, \textit{supra} note 7, at 546.


\(^{42}\) ICCPR, \textit{supra} note 41, art. 25.
These substantive rights are further bolstered by other provisions of the ICCPR which establish the “essential preconditions for an open electoral process,” including the rights to opinion, expression, and association that are necessary for campaigning.\(^{43}\)

2. Regional Treaties

A number of regional treaties have further advanced the principles articulated in the ICCPR.\(^{44}\) The most commonly cited instruments include the African Charter on Human and Peoples’ Rights (African Charter),\(^{45}\) the American Convention on Human Rights (American Convention),\(^{46}\) the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Protocol),\(^{47}\) and a host of treaties through the OSCE.\(^{48}\)

Each of the regional treaties provides substantive support to the ICCPR but is often narrower in scope.\(^{49}\) For example, the European Protocol has neither a provision guaranteeing universal suffrage nor does it prohibit discrimination or mention equal access to public service.\(^{50}\) Article 3 merely states that the “High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of a legislature.”\(^{51}\) Despite its limited text, however, the European Commission and the European Court of Human Rights “have interpreted Article 3 to provide guarantees substantially similar to those contained in [the ICCPR].”\(^{52}\)

The American Convention, by contrast, is largely identical to the ICCPR, but the peculiarities of the participatory problems in the Americas have led the Inter-American Commission on Human Rights,

\(^{43}\) Id. at 18, 19, 22; Franck, supra note 38, at 61.

\(^{44}\) See infra notes 45–63 and accompanying text.


\(^{49}\) See infra notes 50–63 and accompanying text.

\(^{50}\) Fox, supra note 7, at 560–64.

\(^{51}\) European Protocol, supra note 47, at art. 3.

\(^{52}\) Fox, supra note 7, at 560–61.
the principal treaty body, to interpret the rights outlined in the treaty within the context of wholesale violations of other human rights by states.\textsuperscript{53} Thus, the central concern of Article 23 of that convention, according to the Commission, is whether elections are “authentic.”\textsuperscript{54} The Commission has determined that “authentic” means an election that takes place with “a legal and institutional structure conducive to election results that reflect the will of the voters.”\textsuperscript{55}

The African Charter deviates from the ICCPR in a different way than its European and American counterparts.\textsuperscript{56} Article 13(1) states: “Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”\textsuperscript{57} The African Charter lacks the provision guaranteeing that an electoral choice must reflect the free expression of the electors’ will or the opinion of the people, opening the door to one-party elections.\textsuperscript{58}

Through the OSCE, many states have adopted a number of documents reconfirming their commitment to participatory rights.\textsuperscript{59} The Copenhagen Document, concluded on June 29, 1990, established the principles for the structure of all electoral systems.\textsuperscript{60} In essence, it suggested that “[t]he key principles of a democratic election can be summed up in seven words: universal, equal, fair, secret, free, transparent, and accountable.”\textsuperscript{61} The Charter of Paris, signed only months later, broadly endorsed participatory rights and created an Office for Free Elections to implement the Copenhagen Document.\textsuperscript{62} The following year, OSCE helped underscore the seriousness of the rights through the Moscow Document, which injected popular legitimacy as a core value into states’ commitments, in contrast to the de facto test, by di-

\textsuperscript{53} Id. at 565–66.
\textsuperscript{54} Id. at 566.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 568.
\textsuperscript{57} African Charter, supra note 45, art. 13(1).
\textsuperscript{58} Fox, supra note 7, at 568. Professor Fox suggests that the clause alluding to “accordance with the provisions of law” in the African Charter might in fact mean that Article 13 requires no more than that which is already provided for in national constitutions, rendering Article 13 “entirely useless.” Id.
\textsuperscript{59} See Ipp & Hoverter, supra note 32, at 831.
\textsuperscript{60} Fox, supra note 7, at 569.
\textsuperscript{62} Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 207 [hereinafter Charter of Paris]; Fox, supra note 7, at 569.
recting member states not to recognize usurping forces in the event of a coup against a duly elected government.\textsuperscript{63}

3. Synthesis of Treaty Based Participatory Rights

Many commentators suggest that, taken together, the Universal Declaration, the ICCPR, and the regional treaties evince a clear set of standards for free and fair elections under international human rights law.\textsuperscript{64} They argue that participatory rights law guarantees four basic components: periodic and regular elections, universal suffrage, secret ballots, and non-discrimination.\textsuperscript{65} The precise contours of those rights remain hazy.\textsuperscript{66} State practice through election monitoring provides the critical guidance on many of those ambiguities.\textsuperscript{67}

\textbf{B. U.N. Election Monitoring}

According to Gregory Fox, one of the principal proponents of international law as a source for participatory rights, election monitoring provides the logical rights inferred by the treaty-based standards.\textsuperscript{68}

The standards derived from [U.N.] election monitoring permit the addition of the following elements of a legally sufficient election to those derived solely from the human rights treaties: 1) citizens must have the opportunity to organize and join political parties, and such parties must be given equal access to the ballot; 2) to the extent the government controls the media, all parties must have the opportunity to present their views through the media; and 3) the election must be overseen by an independent council or commission not tied to any party, faction, or individual, but whose impartiality is ensured both in law and practice.\textsuperscript{69}


\textsuperscript{64} E.g., Fox, \textit{supra} note 7, at 570; Ipp & Hoverter, \textit{supra} note 32, at 831.

\textsuperscript{65} E.g., Fox, \textit{supra} note 7, at 570; Ipp & Hoverter, \textit{supra} note 32, at 831.

\textsuperscript{66} Fox, \textit{supra} note \textit{supra} note 7, at 570.

\textsuperscript{67} \textit{Id}.

\textsuperscript{68} \textit{Id}. at 570, 588–89

\textsuperscript{69} \textit{Id}. at 589.
Fox’s contention, made in 1992, before the democratization across Europe and other parts of the world in the 1990s, simply fills in the details for meeting the four basic components to a free and fair election.\textsuperscript{70} Interestingly, the U.N. has not explicitly used the treaty provisions of the ICCPR as a basis to engage in election monitoring, but rather has done so based on other powers and at the invitation of individual states.\textsuperscript{71}

C. The Problem of Enforcement

Binding or not, these norms, like much of international human rights law, are hollow without a means to enforce or encourage compliance.\textsuperscript{72} The First Optional Protocol to the ICCPR (“Optional Protocol”), which came into force on March 23, 1976, provides for some enforcement.\textsuperscript{73} The Optional Protocol allows individuals to report violations to the Human Rights Committee, the treaty body under the ICCPR.\textsuperscript{74} Anyone who claims that his or her rights under the ICCPR have been violated and who has exhausted all domestic remedies may petition the Committee.\textsuperscript{75}

While the Human Rights Committee has issued many rulings on individual complaints since its inception, the enforcement is weak based on the language of the Optional Protocol.\textsuperscript{76} Article 4 states: “the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant” and “within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and

\textsuperscript{70} See supra notes 66–69 and accompanying text.
\textsuperscript{71} Fox, supra note 7, at 570–71.
\textsuperscript{72} Ipp & Overter, supra note 32, at 831.
\textsuperscript{74} Optional Protocol, supra note 73, art. 2.
\textsuperscript{75} Id.
\textsuperscript{76} See infra notes 77–79 and accompanying text.
the remedy, if any, that may have been taken by that State.”77 About two-thirds of the parties to the ICCPR have ratified the Optional Protocol.78 As merely a reporting and explanation procedure the Optional Protocol lacks any real compliance mechanism.79 A more effective measure is needed to encourage compliance with these norms and money is the key to the solution.80

D. World Bank Lending Conditions

1. World Bank Assistance

The World Bank grew out of the Bretton Woods Conference that restructured the world financial system in 1944, and originally focused on rebuilding war-torn states after World War II.81 The Bank consists of two institutions, the International Bank for Reconstruction and Development (IBRD) and the newer International Development Association (IDA), and helps finance development projects in member states that often lack the credit required by commercial banks.82 For developing states, financial resources from the World Bank are frequently the primary source of capital for critical development projects.83 Along with the International Monetary Fund (IMF), the World Bank, for most developing nations, is an indispensable part of the evolution from a “lesser developed countr[y]” to the community of developed nations.84

77 Optional Protocol, supra note 73, art. 4.

78 Optional Protocol Ratifications, supra note 73. Not surprisingly, the United States, ever skeptical about outside monitoring of domestic activity, has not ratified the Optional Protocol. See id.

79 See Optional Protocol, supra note 73, art 2, 4.

80 See, e.g., John Kifner, Palestinian Prime Minister Calls Western Aid Cutoff “Blackmail,” N.Y. Times, April 9, 2006, at 11.

81 Mark E. Wadrzyk, Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?, 17 Wis. Int’l L.J. 553, 555 (1999); Asante, supra note 34, at 256 n.138.

82 Wadrzyk, supra note 81, at 553. The World Bank (IBRD and IDA), combined with the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID), collectively make up the World Bank Group. Id. at 555–56. Each institution within the group has specific purposes but they share a collective goal of development, economic growth, and poverty reduction. Id.

83 Id. at 553.

84 See id.
Financing generally comes in two forms: investment loans and development policy loans. Investment loans have a long-term focus (five to ten years) and finance goods, works, and services in support of economic and social development projects in a broad range of sectors. Development policy loans have a short-term focus (one to three years), and provide quick-disbursing external financing to support policy and institutional reforms. These loans typically include an array of conditions placed upon the member state by the Bank.

2. Non-Economic Conditional Lending and Governance Initiatives

Development policy loans, formerly adjustment loans, have been the principal vehicle for non-economic conditionality, although both place conditions on the borrowing state. As the economic, political, and human rights landscape has changed over the last fifty years, so has the World Bank. The Bank’s lending practices are no longer conditioned on strictly economic factors, but include a variety of policy-focused lending based on education, the environment, governance, human rights, economic transformation, and private sector development. The Bank has increasingly looked to “good governance” considerations and analyzed aspects of a member’s governance in its loan decisions. In fact, according to a vice president and general counsel of the World Bank, “conditionality has thus evolved from macroeconomic measures to detailed reforms affecting the public administration itself.” In this regard, the Bank prizes political stability and sound economic management as key to healthy economic development.

87 Id.
88 Id.
89 Id.
90 Wadrzyk, supra note 81, at 554, 562. Wadrzyk notes that the life span of the World Bank “coincides with the life span of the notion of human rights, both of which have grown and adjusted over these past 50 years.” Id. at 562.
91 Id. at 554, 562.
92 Id. at 562–63.
94 Wadrzyk, supra note 81, at 565.
In specific instances, the World Bank has expressly worked to improve social conditions within member states.\textsuperscript{95} For example, funding to Brazil at the start of the twenty-first century was conditioned upon “public investment and social reforms including education and labor issues.”\textsuperscript{96} The 2002 Country Assistance Program Status Report for Brazil makes specific reference to “social and economic progress,” “improvements in education,” “reforms to the labor code,” and other social policy conditions.\textsuperscript{97} In Chad and Cameroon, the Bank imposed conditions on governance as a prerequisite to its involvement in natural resources funding.\textsuperscript{98} The Bank required these states to create an advisory group, related to the oil projects, designed to make recommendations to both nations on “governance in general, the use of funds, and the engagement of civil society.”\textsuperscript{99}

Thematically, the Bank has embarked on two broad non-economic-based initiatives that ultimately benefit its mission to reduce poverty—public sector governance and anti-corruption—which underscore the importance of effective democratic processes.\textsuperscript{100} Thus, the Bank’s efforts to reform public sector governance are for the purpose of “building efficient and accountable public sector institutions. . . . [G]ood policies are not enough . . . . [T]he Bank cannot afford to look the other way when a country is plagued by deeply dysfunctional public institutions that limit accountability, set perverse rules of the game, and are incapable of sustaining development.”\textsuperscript{101}

Moreover, the Bank sees corruption as “among the greatest obstacles to economic and social development.”\textsuperscript{102} The Bank seeks to combat corruption through five key elements: increasing political ac-


\textsuperscript{96} Id.


\textsuperscript{99} Id.


countability, strengthening civil society participation, creating a competitive private sector, encouraging institutional restraints on power, and improving public sector management. In support of these two ends—anti-corruption and public sector governance—the Bank has embarked on specific development projects aimed at targeting these problems. In that regard, the goals of quality governance and ending corruption are the primary purposes of the projects for explicit economic reasons rather than prerequisites to funding.

III. Analysis

A. The Solution—Money Talks

The problem of enforcing the participatory rights ostensibly guaranteed by international human rights law is not unique. Enforcement of other rights under the international system also poses problems. Nor is the solution of encouraging compliance based on financial incentives new—it is the quintessential incentivizer. While a specific proposal to encourage compliance with minimum election requirements has not been suggested, one commentator has raised the possibility of conditions on World Bank funding in this vein:

Although democratic reform conditionality is not currently practiced by the Bank, it is within the realm of possibility in the future. The Bank has recognized the advantages of popular participation in the design and implementation of specific development programs. In extreme cases, posits the Bank’s Legal Counsel, the Bank may see fit to require a degree of democratization within a Borrower country before granting a loan.

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103 Id.
104 Id. (noting “the World Bank has supported more than 600 anticorruption programs and governance initiatives developed by its member countries”).
105 See id.; WORLD BANK, PUBLIC SECTOR GOVERNANCE, supra note 101; see also Wadrzyk supra note 81, at 570 (noting that these types of considerations are permitted based on “vigorous and documented analysis of their economic impact”).
106 See Fox, supra note 7, at 597–98.
107 See id.
108 See, e.g., Kifner, supra note 80, at 11.
109 Wadrzyk, supra note 81, at 574.
Others have cited the Bank’s past record of pressing for political change in states such as Kenya and Malawi in the early 1990s through its consultative groups.\textsuperscript{110}

The World Bank should make a more explicit prerequisite condition for funding based on states’ records on participatory rights.\textsuperscript{111} This condition must be an initial threshold requirement for funding because political participation is an essential precondition to other rights.\textsuperscript{112} Two scenarios are likely.\textsuperscript{113} First, and more egregious: in cases where elections are overturned and an incumbent regime refuses to yield power, the Bank’s agreements with the state require immediate cessation of funds.\textsuperscript{114} Admittedly, these circumstances are not likely to take place very often.\textsuperscript{115} Second, and less egregious: the Bank, during negotiations with a state, requires minimum electoral standards as a precondition to lending in a similar manner as other non-economic-based conditions.\textsuperscript{116} Thus, the Bank would gauge compliance based on the holding of periodic democratic elections by the state and enforce the condition in a similar manner as other conditions.\textsuperscript{117}

The process of review naturally requires specific, identifiable, and reviewable information in order to make the results objective.\textsuperscript{118} That source of information should be the reports from the U.N. election monitoring missions.\textsuperscript{119} The results of elections monitored by the U.N. provide for specific “verifiable data that can be scrutinized.”\textsuperscript{120} To that end, only the minimum requirements must be met by states to satisfy the preconditions; this would diffuse, to some extent, concerns that these conditions would effectively be a complete roadblock to

\begin{footnotesize}
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\item \textsuperscript{110} Makau Wa Mutua, \textit{The Ideology of Human Rights}, 36 \textit{Va. J. INT’L L.} 589, 651–52 (1996). Mutua notes, however, that this kind of pressure was largely absent under similar circumstances in China, Zaire, Morocco, Indonesia, and other states. \textit{Id.}
\item \textsuperscript{111} See Wadrzyk, \textit{supra} note 81, at 572.
\item \textsuperscript{112} Fox, \textit{supra} note 7, at 595.
\item \textsuperscript{113} Cf. \textit{id.} at 603 (foreseeing the first scenario with U.N. accreditation as the enforcement mechanism and implying the second scenario encompassing all other cases).
\item \textsuperscript{114} See \textit{id.}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{117} See \textit{id.}
\item \textsuperscript{118} Fox, \textit{supra} note 7, at 604.
\item \textsuperscript{119} See \textit{id.} at 603.
\item \textsuperscript{120} \textit{Id.} at 604.
\end{itemize}
\end{footnotesize}
aid. They must hold periodic elections through secret ballots with universal suffrage and non-discrimination as well as the other standards outlined above.

There are two principle advantages to using U.N. observers. First, while the World Bank is a specialized and independent institution, it is, in fact, an agency of the U.N. Moreover, “[b]ecause of its international status, the World Bank should consider its responsibilities to the U.N. and rules of international law when making decisions.” Indeed, the U.N. “has become extensively involved in monitoring elections and assisting Member States in their transitions to democracy. Often far more than mere ballot counters, election monitors have played crucial roles in the reengineering of states with limited democratic institutions and traditions.” Second, election monitoring reports, while always subject to criticism, are most authoritative, and thus most useful for legal precedent, when they are official documents of the U.N. rather than from outside observers.

B. Criticisms of Conditional Lending and Institutional Obstacles

Conditional lending has not been without controversy over the last ten years. Some commentators have argued that the World Bank fails to actually enforce the conditions set on development projects. Others claim that conditionality “is coercive and wreaks violent consequences on the hapless poor.” Moreover, critics contend that conditions themselves cannot create sustainable reform. Some human

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121 See supra notes 64–71 and accompanying text (addressing minimum standards); infra notes 128–37 and accompanying text (addressing criticisms of conditionality).
122 See supra notes 64–71 and accompanying text.
123 See infra notes 124–27 and accompanying text.
125 Wadrzyk, supra note 81, at 565–66.
126 Griffin, supra note 27, at 762–63.
127 See, e.g., Fox, supra note 7, at 607. The politicized nature of the U.N. is not unnoticed here. Nonetheless, the accountability of the U.N. is different in kind from independent and private organizations. Cf. id.
129 Thomas, supra note 128, at 2.
130 Id.
131 Id.
rights commentators even contend that some conditions may interfere with another human right, the right to development aid itself.\textsuperscript{132}

A more fundamental obstacle to conditional lending based on overtly political considerations lies in the Articles of Agreement of the World Bank.\textsuperscript{133} Specifically, the Bank is prohibited from interfering in the politics of member states.\textsuperscript{134} Yet, as the Bank has expanded the use of non-economic conditionality, particularly in the areas of anti-corruption and public sector governance, it has done so on the assumption that stable, accountable, honest and transparent institutions breed compliance with development agreements, lead to better outcomes, and help meet the Bank’s core mission of reducing poverty.\textsuperscript{135} In order to overcome this concern, the Bank can either interpret human rights to be outside the Bank’s prohibition on political activity or amend its Articles to realign itself with human rights standards.\textsuperscript{136} Two other international lending institutions, the Inter-American Development Bank and the European Bank for Reconstruction and Development, have either interpreted their charters more broadly or explicitly required multiparty democracies as lending recipients.\textsuperscript{137}

C. Differences Between the Proposed Framework and Traditional Conditional Lending

The solution proposed here is different from the conditions traditionally imposed by the Bank and thus lacks the inherent problems of conditionality.\textsuperscript{138} And while much has changed in conditionality in recent years, criticisms still remain.\textsuperscript{139} Unlike traditional conditionality, a participatory rights condition would be a threshold requirement rather

\textsuperscript{132} Wadrzyk, supra note 81, at 573.
\textsuperscript{133} Id. at 559–60.
\textsuperscript{134} Articles of Agreement of the International Bank for Reconstruction and Development art. IV, § 10, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 (amended Dec. 17, 1965) [hereinafter IBRD Articles] (“The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”) The International Development Association has nearly identical political activity prohibitions. Articles of Agreement of the International Development Association art. V, § 6, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.
\textsuperscript{135} See, e.g., World Bank, Public Sector Governance, supra note 101.
\textsuperscript{136} Wadrzyk, supra note 81, at 574.
\textsuperscript{138} See infra notes 139–46 and accompanying text.
\textsuperscript{139} See generally Thomas, supra note 128.
than a project-specific condition.\textsuperscript{140} Moreover, this condition lacks the complexity of traditional conditions.\textsuperscript{141} Instead, the condition is based on simple, achievable goals.\textsuperscript{142} Further, because of the U.N.’s traditional role of technical assistance in holding elections, the member state will have additional support in fulfilling the condition.\textsuperscript{143} Finally, a participatory rights condition is policy neutral.\textsuperscript{144} That is, while democratic governance is undoubtedly a specific world view, the advancement of that specific goal makes no particular value judgment about accomplishments and policies.\textsuperscript{145} Rather, it gives a state the opportunity to choose its own path on any individual policy through popular sovereignty.\textsuperscript{146}

D. Benefits to the World Bank, Participatory Rights, and Member States

While one might initially ask why it makes sense to impose this condition through the World Bank and not the IMF. The answer lies in their differing missions.\textsuperscript{147} The World Bank focuses on poverty reduction through growth and social change projects whereas the IMF is targeted toward macroeconomic concerns.\textsuperscript{148}

Creating a threshold participatory rights condition in World Bank funding is good for the Bank itself in a number of specific ways.\textsuperscript{149} As Axel Dreher shows, “only regional autonomy and elections significantly and positively influence compliance rates.”\textsuperscript{150} This kind of concrete democratic governance condition encourages compliance in other conditions set by the Bank by placing the focus on the deci-

\textsuperscript{140} Cf. World Bank, Investment & Development Policy Lending, supra note 86 (noting the project specific nature of current conditional lending in contrast to the proposed standard).

\textsuperscript{141} See supra notes 89–105 and accompanying text.

\textsuperscript{142} See supra notes 121–22 and accompanying text.

\textsuperscript{143} See Griffin, supra note 27, at 762–63.

\textsuperscript{144} See Wadrzyk, supra note 81, at 574.

\textsuperscript{145} See id.

\textsuperscript{146} See id.


\textsuperscript{148} See id.

\textsuperscript{149} See infra notes 150–57 and accompanying text.

sion-making process.\footnote{See Fox, supra note 38, at 307 (noting that compliance in many areas of governmental activities increases with broad citizen participation, and other democratic reforms domestically).} As a result, it increases transparency in the decision-making process.\footnote{See id.} Transparency directly impacts the Bank’s mission to target corruption in member states.\footnote{See World Bank, Anti-Corruption, supra note 102.} This framework helps advance the institutionalization of “ownership” — a key goal of World Bank conditional lending following criticism of the practice over the past ten years.\footnote{See World Bank, Review of World Bank Conditionality, available at http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20292723~pagePK:41367~piPK:51533~theSitePK:40941,00.html (last visited Apr. 15, 2007).} Externally, open governmental decision-making aids local “Civil Society Organizations” to become active participants in the process of policy making, another Bank concern.\footnote{See World Bank, The World Bank and Civil Society, available at http://web.worldbank.org/WEBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20092185~menuPK:220422~pagePK:220503~piPK:220476~theSitePK:228717,00.html (last visited Apr. 15, 2007) (noting that inclusion of Civil Society Organizations, such as community-based organizations, NGOs, indigenous peoples organizations, labor unions, faith-based groups, and foundations, “can enhance . . . operational performance by contributing local knowledge, providing technical expertise, and leveraging social capital. Further, CSOs can bring innovative ideas and solutions, as well as participatory approaches, to solving local problems”).} Moreover, as a check on member states, such a condition would become a regular benchmark for monitoring World Bank projects.\footnote{See Wadrzyk, supra note 81, at 574.} Finally, open democratic processes make it easier to encourage private investment because investors rely on stable democratic systems to ensure a proper return on their investment.\footnote{Id. at 558; see World Bank, Financing Instruments, supra note 85.}

For participatory rights and the global world, the benefits of the proposed solution are innumerable.\footnote{See infra notes 159–61 and accompanying text.} The proposed framework would incentivize the creation of a democratic culture in developing nations.\footnote{See Franck, supra note 38, at 47–48.} Nations that make the transition to democratically elected governments bolster their own legitimacy and credibility in the eyes of the international community and their people.\footnote{See, e.g., Nhan T. Vu, The Non-Democratic Benefits of Elections—The Case of Cambodia, 28 CASE W. RES. J. INT’L L. 395, 395 (1996). Cf. Fox, supra note 7, at 597 (noting the fact that South Africa’s government was viewed as illegitimate absent adherence to basic human rights).} Moreover, it would encourage adherence to international standards of participatory rights,

\footnote{151 See Fox, supra note 38, at 307 (noting that compliance in many areas of governmental activities increases with broad citizen participation, and other democratic reforms domestically).} \footnote{152 See id.} \footnote{153 See World Bank, Anti-Corruption, supra note 102.} \footnote{154 See World Bank, Review of World Bank Conditionality, available at http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20292723~pagePK:41367~piPK:51533~theSitePK:40941,00.html (last visited Apr. 15, 2007).} \footnote{155 See World Bank, The World Bank and Civil Society, available at http://web.worldbank.org/WEBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20092185~menuPK:220422~pagePK:220503~piPK:220476~theSitePK:228717,00.html (last visited Apr. 15, 2007) (noting that inclusion of Civil Society Organizations, such as community-based organizations, NGOs, indigenous peoples organizations, labor unions, faith-based groups, and foundations, “can enhance . . . operational performance by contributing local knowledge, providing technical expertise, and leveraging social capital. Further, CSOs can bring innovative ideas and solutions, as well as participatory approaches, to solving local problems”).} \footnote{156 See Wadrzyk, supra note 81, at 574.} \footnote{157 Id. at 558; see World Bank, Financing Instruments, supra note 85.} \footnote{158 See infra notes 159–61 and accompanying text.} \footnote{159 See Franck, supra note 38, at 47–48.} \footnote{160 See, e.g., Nhan T. Vu, The Non-Democratic Benefits of Elections—The Case of Cambodia, 28 CASE W. RES. J. INT’L L. 395, 395 (1996). Cf. Fox, supra note 7, at 597 (noting the fact that South Africa’s government was viewed as illegitimate absent adherence to basic human rights).}
adding weight to their binding nature from a customary law perspective and bolstering their importance in the international system.\(^{161}\)

Finally, focusing on developing nations as opposed to other nations utilizes the most likely candidates for democratic change.\(^{162}\) When nations become serious about development, they are in the perfect position for structural and institutional change.\(^{163}\) As the World Bank’s review of the role and place of conditionality in international financial assistance stated, “[t]urnaround cases, new governments, and crisis situations may provide windows of opportunity for reform.”\(^{164}\) Through its work, “the Bank seeks to strengthen the economies of borrowing nations so that they can graduate from reliance on Bank resources and meet their financial needs, on terms they can afford directly from conventional sources of capital.”\(^{165}\) Moreover, this is a time when their populations are looking for legitimacy and a voice in the government.\(^{166}\) Established autocracies that are not developing, for example, lack the internal political incentive and willingness to make change.\(^{167}\) While this certainly leaves a gap in enforcement, achieving a change in adherence to international standards on participatory rights in states that do meet the criteria, still accomplishes the goals in the states that are most ripe for change and in a majority of states worldwide.\(^{168}\)

**Conclusion**

Participatory rights generally, and democratic elections specifically, have arguably become a requirement for states in the international legal system. While adherence to international minimum standards is growing, more needs to be done to encourage compliance. Conditioning World Bank funding in this regard is one step toward further institutionalizing free and fair elections in the international system. The leverage that the World Bank holds is immense and can be put to use in a constructive way that advances its goals and benefits member states and the global system.

\(^{161}\) See Fox, *supra* note 7, at 570–71, 604.

\(^{162}\) See *Conditionality Revisited*, *supra* note 116, at 4.

\(^{163}\) See *id*.

\(^{164}\) *Id*.

\(^{165}\) Driscoll, *supra* note 147, at 6.

\(^{166}\) See Franck, *supra* note 38, at 47–48.


\(^{168}\) See *supra* notes 162–67 and accompanying text.
The U.N. did not monitor the elections in Belarus. Perhaps that nation would have requested participation from the U.N. if it knew that its financial assistance from the World Bank was on the line, assistance on the order of $190 million since its independence and over $22 million in active projects. The technical assistance provided by the U.N. might have averted the questionable results now boiling over in the region, further benefiting the people of Belarus and guaranteeing true popular sovereignty.

CRIMINALIZING WAR: TOWARD A JUSTIFIABLE CRIME OF AGGRESSION

Michael O’Donovan*

Abstract: State parties to the International Criminal Court made history in 1998 when they agreed to include the crime of aggression as one of four crimes within the jurisdiction of the Court. The crime, however, was left undefined in 1998, and the Court’s jurisdiction over the crime of aggression has been postponed until state parties can agree to a definition at a Review Conference in 2009. Reaching such an agreement would represent the first time in history that national leaders would be bound by a specifically defined crime of international aggression with sanctions wielded by an international court. Parties to the Court, however, differ widely over two questions: whether the crime should be defined narrowly or broadly, and who should decide when aggression has occurred, thus triggering the Court’s jurisdiction over the culpable individuals. The two questions have largely split state parties between those citing the demands of the current international system and those committed to basic principles of fairness. This Note suggests that by applying the traditional utilitarian and retributivist rationales for the criminal law, state parties may be able to reach the most balanced and principled definition of aggression.

Introduction

In July 1998 a United Nations (U.N.) Conference in Rome negotiated and adopted a treaty that set up the world’s first International Criminal Court (ICC).¹ State delegations in Rome settled on four crimes falling within the jurisdiction of the new court: “War Crimes,” “Crimes Against Humanity,” “Genocide,” and “Aggression.”² The inclusion of the first three crimes was undisputed.³ The crime of aggression,
however, was highly controversial, and remains divisive today. Unlike the first three crimes, the crime of aggression implicates not only individual responsibility, but state responsibility as well. The Court would seemingly intrude on the province of the U.N. and the Security Council if it were to identify and prosecute instances of state aggression. And unlike the other crimes, which describe brutal acts of violence, aggression is a more subjective and circumstantial crime, highly dependent on perspective, and invoking the most sensitive questions of defense and international security.

Faced with these inherent differences, states in Rome faced two related problems: (1) how to define the prohibited acts with sufficient clarity; and (2) who would judge whether aggression had occurred, thus “triggering” the Court’s jurisdiction over individual liability. While these conceptual difficulties gave rise to calls for excluding the crime from the Court’s jurisdiction, many smaller states insisted on its inclusion. In the end, states agreed to a compromise: the Statute of the Court would include the crime of aggression, but the Court’s jurisdiction over the crime would be suspended until states could agree on a definition and on how the jurisdiction of the Court would be triggered. Member States created a working group on the crime of aggression that would work toward a resolution and deferred the controversy until a Review Conference would convene to discuss amendments to the Statute seven years after it took effect. The Working Group has since expressed the goal of offering a unified proposal by

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4 Id.
6 Theodor Meron, Defining Aggression for the International Criminal Court, 25 Suffolk Transnat’l L. Rev. 1, 3 (2001).
8 See Meron, supra note 6, at 3.
9 See Ferencz, supra note 7, at 351; von Hebel & Robinson, supra note 2, at 82.
10 See von Hebel & Robinson, supra note 2, at 82.
12 See Rome Treaty, supra note 1, art. 5(2); see also Meron, supra note 6, at 2; Paulus, supra note 11, at 21.
14 See Rome Treaty, supra note 1, art. 123.
2008. And while the Working Group has produced thoughtful commentary and identified discrete options, its reports demonstrate the same competing commitments to principle and pragmatism that produced the stalemate in Rome.

The effort to define aggression is important. Despite the best efforts of its detractors, the ICC has become a relevant and useful force in the international community. While observers note the possibility of excluding the crime of aggression and using the other crimes to prosecute war criminals, the failure to include the crime of aggression would represent a significant regression in the rule of international law. Criminalizing aggression satisfies a universal need to affirm our shared values, deter unjustified conflict, and punish the criminal who disrupts peaceful lives through violence or the threat of violence. Criminalizing aggression is not merely an academic exercise; it is a significant expression of humanity’s rejection of war as statecraft, and potentially an important step towards a more just and peaceful international order.

In order to move beyond the current debate and towards a principled, fully justifiable crime of aggression, the Working Group should utilize the traditional analytic frameworks for domestic criminal law. Like domestic crimes, international criminal laws should accord with utilitarian and retributivist rationales to the greatest extent possible. The failure to justify the crime of aggression in accord with these philosophical frameworks will render a definition assailable by critics as

15 See id.; Documents of the Fourth Session, supra note 5, para. 90.
16 See, e.g., Documents of the Fourth Session, supra note 5, paras. 66–68.
17 See Meron, supra note 6, at 3; Trahan, supra note 13, at 442.
21 See Ferencz, supra note 7, at 358.
22 See id.; Meron, supra note 6, at 3.
unjust or ineffective.\textsuperscript{25} By applying these traditional philosophies of penal law, the Working Group will be able to formulate the most justifiable and rigorous solution possible. \textsuperscript{26}

Part I of this Note will trace the history of the concept of aggression and the negotiating history of the crime of aggression. Part II will discuss the contributions of the Working Group and the important considerations of Member States. Part III will apply the traditional utilitarian and retributivist rationales in order to suggest specific approaches that are most consistent with the goals and purposes of the law.

I. Background

While war traditionally was viewed as a legitimate extension of statecraft—“political intercourse, carried on with other means,” in the words of Prussian military philosopher Carl von Clausewitz\textsuperscript{27}—World War I served to crystallize the notion that the aggressive acts of one state against another were not just unlawful but criminal.\textsuperscript{28} As early as 1919, the Treaty of Versailles contemplated measures to try Kaiser Wilhelm II of Hohenzollern in a court of law for “a supreme offense against international morality and the sanctity of treaties.”\textsuperscript{29} While the Kaiser won refuge in the Netherlands from the allied tribunal, the effort clearly asserted the principle that crimes against peace should be punished, and that international tribunals could exercise jurisdiction over such crimes.\textsuperscript{30} Indeed, while rejecting the allied request for extradition based on the ad hoc character of the proposed tribunal, the Netherlands added:

If in the future there should be instituted by the society of nations an international jurisdiction, competent to judge in case of war deeds qualified as crimes and submitted to its jurisdiction by statute antedating the acts committed, it would be fit for Holland to associate herself with the new regime.\textsuperscript{31}

\textsuperscript{25} See id.
\textsuperscript{26} See id.
\textsuperscript{27} Carl von Clausewitz, On War 87 (Michael E. Howard & Peter Perret trans., 1976); see also Immanuel Kant, The Philosophy of Law, ch. 56 (B.D.W. Hastie trans. 2002).
\textsuperscript{28} See Alfaro, supra note 20, para. 6.
\textsuperscript{29} Id. para. 8.
\textsuperscript{30} Id. para. 12.
\textsuperscript{31} Paulus, supra note 11, at 9.
This insistence on a criminal code and permanent court were echoed by the architects of the League of Nations and the Permanent Court of International Justice (PCIJ) in 1920. While the advisory committee tasked with creating the new world court decided that a criminal jurisdiction posed unnecessary obstacles to the new PCIJ—a court established to judge the affairs of nations and not of individuals—the committee did not rule out the possibility of creating a separate branch of the court in the future to deal with criminal jurisdiction. Those who opposed including a criminal branch of the PCIJ at that early stage noted the absence of any international penal law, and the violation of the principle *nulla poena sine lege* (no punishment without law).

Efforts to outlaw wars of aggression continued throughout the early years of the League of Nations, and culminated in the expression of the Kellogg-Briand Pact of 1928. The United States, France, and the other major powers of the day concluded that the “time has come [for] a frank renunciation of war as an instrument of national policy . . . .” However, the international community failed to erect any enforcement mechanism over the ambitious agreement, and it came to be seen as little more than hortatory rhetoric.

The principle of a universal criminal jurisdiction over international crimes was again advanced in 1937 when states negotiated a Convention for the Prevention and Punishment of Terrorism. The Convention was accompanied by a Protocol to establish an international criminal court with the specific and limited jurisdiction over the alleged terrorists, but neither the Convention nor the Protocol ever garnered sufficient support to enter into force.

A. Nuremberg

In January 1942, in the midst of World War II, nine Allied governments met in London to condemn the atrocities of the Axis ag-

32 See Alfaro, supra note 20, paras. 14–17.
33 See id. para. 16.
34 Id. para. 17.
36 Id.
37 See id.
38 Alfaro, supra note 20, para. 26.
gressors. The result of the meeting was the Inter Allied Declaration on Punishment of War Crimes, or the St. James Declaration, in which the Allies declared their aim to punish those responsible for war crimes “through the channel of organized justice.” The document cites the need to punish in order to avoid acts of vengeance committed by the general public “and in order to satisfy the sense of justice of the civilised world.” Lord Simon later added “we shall never do any good to our own standards, to our own reputation and to the ultimate reform of the world if what we do is not reasonably consistent with justice . . . .”

In August 1945, following the cessation of hostilities, the governments of the United States, France, Great Britain, and the Soviet Union, gathered in London to write a Charter establishing an International Military Tribunal (IMT) to try war criminals of the European Axis. The London Charter defined the crimes within the jurisdiction of the Tribunal as “crimes against the peace,” “war crimes,” and “crimes against humanity.” Justice Robert Jackson of the U.S. Supreme Court served as the Chief Prosecutor for the Tribunal before four judges representing each of the four Allied powers. The Charter defined “crimes against peace” simply as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Thus, without any separate definition of what constituted a “war of aggression,” the Charter simply defined one vague concept—crimes against peace—by reference to another—a war of aggression.

Critics of the tribunal also pointed to four primary flaws: the tribunal was of an ad hoc nature, and not permanent; it was more political than juridical; the judges were appointed by the four allies and were not representative of the international community; and the individuals responsible for war crimes were tried summarily by military tribunals in the heat of war.

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40 Alfaro, supra note 20, para. 31.
41 Id. para. 32.
42 Id. para. 31.
43 Id. para. 34. These justifications offer a number of retributivist, utilitarian, and expressive rationales. See id.
45 Id. art. 6.
46 Id. art. 2; see Ferencz, supra note 7, at 344.
47 Charter of the International Military Tribunal, supra note 44, art. 6(a).
48 See Paulus, supra note 11, at 13. Justice Jackson conceded, “it is perhaps a weakness in this Charter that it fails itself to define a war of aggression.” Id. at 13–14.
charter was said to have disregarded the principle of *nulla crimen nulla poena sine lege* (there is no crime, nor punishment, without a law).\(^49\)

In response to the last, and most serious criticism,\(^50\) the tribunal countered that wars of aggression were already illegal and a crime under customary law.\(^51\) Whether or not the Charter reflected the state of customary law in 1945, the judgments of the IMT have since become enshrined in international law, supporting a new—or at least more explicit—norm against international aggression.\(^52\)

While the tribunal at Nuremberg, and the later tribunal established by General McArthur for the Far East,\(^53\) represented the first actual international trials of individuals as war criminals—a huge innovation in international law—Jackson remained convinced that the greatest achievement of the tribunals was the condemnation of aggressive war itself.\(^54\) Indeed, the “crimes against peace” articulated in the Charter and the judgments of the Nuremberg Tribunal were unanimously affirmed by the General Assembly of the new United Nations in 1946.\(^55\) Cognizant, however, of the strict view that the London Charter had defined its crimes after the fact, and thus violated the principle of *nulla crimen nulla poena sine lege*, the U.N. directed the preparation of a formalized code of international crimes and a statute for a new international criminal tribunal.\(^56\) These efforts, however, proved difficult as the rapid dissolution of international unity after World War II gave way to the outright hostility of the Cold War.\(^57\) The perceived primacy of national security dramatically slowed the development of both the court and the codification of any criminal code.\(^58\)

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\(^49\) Alfaro, *supra* note 20, para. 39.

\(^50\) *Id.* para. 103.


\(^52\) See Meron, *supra* note 6, at 6; see also Alfaro, *supra* note 20, para. 105; Paulus, *supra* note 11, at 3–4.

\(^53\) Alfaro, *supra* note 20, para. 41. The Far East Tribunal, established by General McArthur, included judges representing eleven nationalities. *Id.* It functioned in a manner and under principles almost identical with those of the Nuremberg tribunal. *Id.*

\(^54\) See Ferencz, *supra* note 7, at 346.


\(^56\) G.A. Res. 95(I), *supra* note 55, at 188; see also Alfaro, *supra* note 20, para 43; Ferencz, *supra* note 7, at 346–7.


B. United Nations General Assembly Resolution 3314

While progress during the Cold War was slow, the U.N. reached a consensus definition of aggression with the unanimous passage of Resolution 3314 in 1974.\footnote{G.A. Res. 3314, U.N. GAOR 29th Sess., Definition of Aggression, Annex, Definition of Aggression, U.N. Doc. A/Res./3314 (XXIX)(1974) [hereinafter Res. 3314]; see also Ferencz, \textit{supra} note 7, at 347.} Under Article 24 of the U.N. Charter, the Security Council has the primary responsibility for maintaining global peace and security by countering acts of aggression;\footnote{U.N. Charter art. 24, para. 1. Art. 24(1) reads, “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” \textit{Id.}} but the Charter does not define that term and the Security Council has been free to make such declarations without referencing any objective criteria.\footnote{See Historical Review, \textit{supra} note 51, paras. 379–429 (describing declarations of aggression by the U.N. Security Council).} Therefore, the definition contained in U.N. Resolution 3314 was formulated ostensibly to guide the Security Council in its determinations of when aggression had occurred.\footnote{See Meron, \textit{supra} note 6, at 7.} The Resolution, non-binding in itself, condemned the use of armed force by a state against the sovereign territorial integrity or political independence of another state.\footnote{See Ferencz, \textit{supra} note 7, at 347, 354–55.} The definition then goes on to list a series of acts that qualify as acts of aggression.\footnote{G.A. Res. 3314, \textit{supra} note 59, art. 3.} The list of acts, however, is described as non-exhaustive and the General Assembly made clear that the Security Council may determine that other acts also constitute aggression,\footnote{\textit{Id.} art 4.} or that acts technically falling within the description of aggression might be justified under the circumstances of the case.\footnote{\textit{Id.} art. 2.} The Resolution passed unanimously, but has since been largely ignored by the Security Council, which has generally avoided using the term.\footnote{See Paulus, \textit{supra} note 11, at 17.} Observers note that the Council has been reluctant to alienate one party to a conflict by identifying an act of state as aggression, preferring instead to note threats or breaches of the peace.\footnote{\textit{Id.}}
C. The Rome Conference

The idea of an international criminal court was revived in the late 1980s and early 1990s, in part as a means to combat terrorism and transnational drug crimes. The International Law Commission of the U.N. (ILC) was tasked by the Security Council with setting up the court and issued a Draft Statute for a court in 1994 as well as a Draft Code of Crimes in 1996. Between 1996 and 1998 a U.N. Preparatory Committee refined the work of the ILC, and in June and July 1998 160 state delegations met in Rome to finalize and adopt a convention.

The ILC Draft Statute recognized two categories of crimes. The first category, core crimes, included genocide, violations of the laws of war, crimes against humanity, and aggression. The second category was made up of treaty crimes, such as torture, drug crimes, and certain acts of terrorism. But from the beginning of negotiations, states expressed a preference for limiting the jurisdiction of the Court to core crimes. It was hoped that limiting the jurisdiction to those crimes that were customary would promote the widest acceptance and greatest credibility for the court. However, the inclusion of the crime of aggression remained controversial at Rome until the end of the conference. Three distinct questions separated the views of the state parties: whether the crime should be included at all; what was the proper role of the Security Council with respect to identifying instances of aggression; and how to define the crime so as to satisfy the principle of nullem crimen sine lege.

With regard to the role of the Security Council, the ILC had recommended in its draft statute that the Security Council must first declare an act of aggression before the Court could take jurisdiction over...
the crime. This provision was included for the sake of securing the broadest possible participation and based on the primary role of the Security Council in identifying acts of aggression as expressed in Art. 39 of the U.N. Charter. The proposed court was thus limited to determining individual responsibility for the crime, and shielded from the politically sensitive determination of when international aggression had taken place. This approach was supported strongly by the permanent members of the Security Council. Critics however, argued that this gave too much power to the Council. By wielding their veto power over disfavored determinations, the permanent members of the Council would be able to commit the crime with impunity or shield allies from the reach of the Court.

With respect to the problem of definition, three approaches were considered. The first was to provide a generic definition that would define state aggression. The second was to produce a general definition in combination with a list of acts representing aggression, such as Resolution 3314. The third approach was not to define aggression at all, leaving the determination to the Security Council. During the Rome conference states expressed concerns that a narrow definition would prove too restrictive, while a broad approach could be abused for political purposes and jeopardize the independence of the court.

Opponents of including the crime suggested that these conceptual difficulties posed insurmountable obstacles for the Conference in Rome. Others, however, argued that excluding the crime of aggression would represent a significant step backwards, since the Nuremberg and Tokyo Tribunals had prosecuted criminals for the same...
crime fifty years earlier. Advocates for including the crime of aggression took a hard line in negotiations, but it became increasingly clear that states would not be able to agree on a definition of the crime or how the court’s jurisdiction would be “triggered.” The non-aligned movement eventually proposed a compromise that would include the crime but leave the definition to a later stage. Thus the current Statute includes the crime in the jurisdiction of the Court, but suspends that jurisdiction until state-parties can resolve the outstanding issues. The Statute makes clear that the definition must be consistent with the provisions of the U.N. Charter and be adopted in accordance with articles 121 and 123 of the Statute, which direct a Review Conference and amendment procedure seven years after the Statute enters into force.

Following the successful negotiation and passage of the Rome Charter in 1998, the Assembly of States Parties (ASP) charged a Preparatory Commission with fleshing out remaining issues, such as rules of procedure and the definition of aggression. While the Commission was not able to reach an agreement on the crime before the Court took effect, it did offer a useful discussion paper in July 2002 offering options to both define the crime and trigger the jurisdiction of the Court. The Commission also created a Working Group on the Crime of Aggression to continue to elaborate on these proposals with the aim of reaching a consensus at a future Review Conference. Since that time, the Working Group has debated elements of the crime, issuing the latest report on its progress in June 2005.

95 Id. at 82; see also Dawson, supra note 19, at 446–47.
96 Ferencz, supra note 7, at 350–51; von Hebel & Robinson, supra note 2, at 85.
97 See von Hebel & Robinson, supra note 2, at 85.
98 Rome Treaty, supra note 1, art. 5(2); von Hebel & Robinson, supra note 2, at 85.
99 Rome Treaty, supra note 1, art. 5(2). Art. 5(2) reads, “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Id.
102 Id. at 2; see also Trahan, supra note 13, at 446.
II. Discussion

The two main obstacles facing the Working Group have been the difficulty (a) defining the crime; and (b) “setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime.”104 This second issue is the more politically intractable of the two, pitting the presumed power and prerogative of the Security Council against the principles of fairness and accountability.105

A. Determining Aggression

The final compromise worked out in Rome clarified that the eventual definition of aggression would include the circumstances “under which the Court’s jurisdiction may be exercised”—i.e. how the Court’s jurisdiction would be “triggered.”106 While the Court may be competent to try individuals, determinations implicitly condemning an act of state were thought to be beyond the competence of the Court.107 Thus a prior determination of aggression by an external body should be made a precondition of the Court’s jurisdiction.108 Additionally, the Court’s Statute explicitly notes that any eventual provision must be consistent with the U.N. Charter.109 While it is clear that this refers to the role of the U.N. in “triggering” the jurisdiction of the Court, states have divided widely on the appropriate relationship between the Court and the U.N.110

Some, echoing the ILC Draft Statute, suggest that the permanent members of the Council will insist on their presumed prerogative under Articles 24 and 39 of the U.N. Charter,111 and that in order to mitigate politicized accusations against the major powers and garner

104 Rome Treaty, supra note 1, art. 5, para. 2; see also Trahan, supra note 13, at 447.
105 See Trahan, supra note 13, at 453; see also Paulus, supra note 11, at 24–25.
106 See Rome Treaty, supra note 1, art. 5(2).
107 See Working Group Report, supra note 103, para. 66; see also Trahan, supra note 13, at 464.
109 Rome Treaty, supra note 1, art. 5(2).
110 See Working Group Report, supra note 103, para. 65.
111 U.N. Charter art. 39; Working Group Report, supra note 103, para. 66. Art. 39 reads, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.
the support of those states, the Council should be given the exclusive ability to initiate a charge of aggression.112

Those arguing against exclusive competence of the Security Council point out that Article 24 confers only “primary” and not “exclusive” competence on the Council.113 Providing exclusive competence would paralyze the Court if the Council proved unwilling or unable to address any dispute.114 Furthermore, exclusivity would permit the permanent members of the Security Council115 to shield their nationals or allies from prosecution, thus resulting in a two-tiered administration of justice.116 Additionally, Art. 39 must be understood in the context of Chapter VII of the U.N. Charter, which relates to the responsibility of the Council to maintain peace between states.117 The Council’s determination under Art. 39 is thus for the purpose of maintaining peace and security at a systemic level, and not for the purpose of assigning individual criminal responsibility.118 Finally, concern has been expressed that a political determination would undermine the development of precedent and customary law.119 According to this argument, political determinations would destroy the credibility of the prosecution and provide little principled guidance for future determinations.120

Some supporters of the Court suggest that the Court itself should make the determination that aggression has occurred.121 This option would seem to maximize the independence and power of the Court.122 However, the option would also thrust the Court into delicate questions of international relations and invite charges of politicization, unaccountability, and incompetence.123 The option was included in the discussion paper of the coordinator, but the Working Group appears to

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112 See Paulus, supra note 11, at 24; see also Meron, supra note 6, at 12–13.
113 Working Group Report, supra note 103, para 69; see also Paulus, supra note 11, at 21.
114 Working Group Report, supra note 103, para. 73.
117 See U.N. Charter ch. VII.
118 See Working Group Report, supra note 103, para 69; see also Paulus, supra note 11, at 21.
119 See Working Group Report, supra note 103, at para. 68.
120 Id.
121 See id. at para. 72.
122 See id.; see also Dawson, supra note 19, at 448.
123 See Meron, supra note 6, at 3, 13.
have dismissed the idea, noting that the Security Council would seem to have some mandatory role under Article 39—though not necessarily an exclusive one.\textsuperscript{124}

Alternatively, the failure of the Council to act on any matter may be seen to cede the issue to the General Assembly.\textsuperscript{125} The U.N. Charter gives the Assembly the right to consider any topic,\textsuperscript{126} and make any recommendation in the interests of peace,\textsuperscript{127} subject only to constraints when the Security Council is affirmatively acting on a matter\textsuperscript{128} or when an issue requires “action” by the Security Council.\textsuperscript{129} The determination of aggression may well be seen to fall within the Assembly’s powers of discussion and “recommendation.”\textsuperscript{130}

Additionally, the General Assembly has previously asserted its power when the Security Council has proven unable to assume its responsibilities under the U.N. Charter.\textsuperscript{131} The Uniting for Peace Resolution of 1950, expressly resolved that:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . . \textsuperscript{132}

\begin{itemize}
\item \textsuperscript{124} See Discussion Paper, \textit{supra} note 101, at 3; Working Group Report, \textit{supra} note 103, para. 72.
\item \textsuperscript{125} See Working Group Report, \textit{supra} note 103, para. 70; see also \textit{Historical Review}, \textit{supra} note 51, para. 406.
\item \textsuperscript{126} U.N. Charter art. 10. Art. 10 reads, “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.” \textit{Id}.
\item \textsuperscript{127} U.N. Charter art 14.
\item \textsuperscript{128} \textit{Id.} art. 12.
\item \textsuperscript{129} \textit{Id.} art. 11(2).
\item \textsuperscript{130} See \textit{id.} arts. 10, 14.
\item \textsuperscript{132} Uniting for Peace Resolution, \textit{supra} note 131, para. 1.
\end{itemize}
Since 1950, the General Assembly has acted under this power on a number of occasions thus providing the added authority of precedent and customary law.\textsuperscript{133}

Finally, the ICJ may also be held competent to trigger jurisdiction.\textsuperscript{134} A determination made by a judicial organ would not be subject to the same critiques of overt politicization.\textsuperscript{135} The ICJ is an established court, representative of the international community and, as the “principal judicial organ of the United Nations,” is indisputably competent to make such determinations.\textsuperscript{136} The ICJ has previously interpreted acts of aggression and proven sensitive to the critical question of self-defense and justification.\textsuperscript{137} Thus, determinations would be most authoritative if made by such a representative and competent judicial organ.\textsuperscript{138}

However, according to the U.N. Charter, either the General Assembly or the Security Council must request an ICJ advisory opinion.\textsuperscript{139} Therefore, the jurisdiction of the ICJ must itself be “triggered” by a request from one of the other two bodies.\textsuperscript{140} Thus, the options available to the Working Group are: (a) a determination made exclusively by the Security Council; (b) a determination made by either the Council or the General Assembly; or (c) a “three power” approach including all the organs of the U.N.\textsuperscript{141} Providing for determinations from multiple bodies, however, has raised the concern over the risk of inconsistent determinations.\textsuperscript{142}

A final issue concerns the effect of any pre-determination on the ICC.\textsuperscript{143} If the Security Council or the ICJ makes a determination that aggression has occurred, is it appropriate for the prosecutor to re-

\textsuperscript{133} See Historical Review, supra note 51, paras. 415–29; Working Group Report, supra note 103, para. 70.

\textsuperscript{134} Working Group Report, supra note 103, para. 65; see also Trahan, supra note 13, at 462.

\textsuperscript{135} See Working Group Report, supra note 103, para. 68; see also Trahan, supra note 13, at 462–63.

\textsuperscript{136} U.N. Charter art. 92; see also Paulus, supra note 11, at 25. Paulus suggests the ICJ is also probably more conservative than the ICC is likely to be. Paulus, supra note 11, at 25.

\textsuperscript{137} See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27).

\textsuperscript{138} See Working Group Report, supra note 103, para. 68.

\textsuperscript{139} U.N. Charter art. 96(1).

\textsuperscript{140} See id.

\textsuperscript{141} See Working Group Report, supra note 103, para 65; Meron, supra note 6, at 14.

\textsuperscript{142} Trahan, supra note 13, at 462. As a matter of building an autonomous and apolitical definition, the multi-organ approach is problematic. See id.; Working Group Report, supra note 103, para. 68.

\textsuperscript{143} See Trahan, supra note 13, at 462; see also Working Group Report, supra note 103, paras. 60–62.
evaluate that judgment or merely to find the responsible individual?  

A re-evaluation clearly risks the ICC coming to a different conclusion. But a binding decision by any of the U.N. organs would appear to violate the rights of the accused and presume guilt instead of innocence.

B. The Definition

The second controversy is how to define the act of aggression. States have debated three basic approaches to define the act of aggression. The first uses a generic definition that would define state aggression. The second method is to adopt the approach of Resolution 3314 and describe specific acts that constitute aggression. The third approach does not define the act of aggression at all leaving the matter completely to the determination of the Security Council.

The Coordinator’s discussion paper suggests that the crime of aggression is committed when a person:

being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation in the Charter of the United Nations.

The discussion paper then provides three options for clarifying the proposal. The first option would add “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of or annexing the territory of another State or part thereof.” The second option adds essentially the same provi-
sion but substitutes “and amounts to” for “such as,” thereby strictly limiting the definition to cases of occupation or annexation.\textsuperscript{155} Option three is simply to leave the proposal as is.\textsuperscript{156}

The discussion paper continues in paragraph two, stating that an act of aggression means an act referred to in UNGA Resolution 3314 (XXIX) of December 14, 1974, which is determined to have been committed by the state concerned.\textsuperscript{157} The two options listed after paragraph two both seek to clarify that another body—the Security Council or some combination of the Council, Assembly, and ICJ—must first make the determination that the crime has occurred.\textsuperscript{158}

The discussion paper also outlines the elements of the crime separately, clarifying the mens rea, the leadership nature of the crime, and the required gravity of the aggression to qualify as a crime.\textsuperscript{159}

Among the competing concerns at the Working Group are the degree of faithfulness to a “traditional” definition, such as the Nuremberg principles, and the ability to define the evolving nature of the crime.\textsuperscript{160} According to the former argument, the “core” crimes that were included in the Statute were customary crimes, the decision having been made not to include “treaty crimes” within the jurisdiction of the new court.\textsuperscript{161} The definition of each concept should therefore reflect a traditional understanding of the crime.\textsuperscript{162} Others argue, however, that previous tribunals, such as Nuremberg, have been concerned with completed acts of aggression, and therefore have not needed to think of the crime in a progressive or evolving way.\textsuperscript{163} Since the Rome Statute treats the other “customary” crimes, such as crimes against humanity, in an extraordinarily progressive fashion, it is appropriate to advance the definition of aggression, including not only traditional forms of aggression, such as military occupation, but evolving methods as well.\textsuperscript{164} In its 2005 report, the Working Group notes simply that among its state delegations there exists a considerable

\textsuperscript{155}Id.
\textsuperscript{156}See id.
\textsuperscript{157}Discussion Paper, supra note 101, at 3.
\textsuperscript{158}See id. at 3–4.
\textsuperscript{159}See id. at 4–5.
\textsuperscript{160}See Working Group Report, supra note 103, paras. 78, 79; see also Meron, supra note 6, at 8.
\textsuperscript{161}See von Hebel & Robinson, supra note 2, at 80, 81.
\textsuperscript{162}Working Group Report, supra note 103, para. 78; see also Meron, supra note 6, at 8, 11–12.
\textsuperscript{163}See Working Group Report, supra note 103, para. 79.
\textsuperscript{164}Id.; Trahan, supra note 13, at 456.
preference for a generic approach, motivated presumably by a desire to capture the evolving variations of the crime by would-be aggressors.\textsuperscript{165}

III. Analysis

The act of punishing an individual for a violation of criminal law can be justified on a number of philosophical grounds.\textsuperscript{166} The two dominant rationales for a penal law are the desire for retribution and the utilitarian desire to prevent or deter such violations altogether.\textsuperscript{167} Viewing the choices facing the Working Group from the perspective of these two rationales, it is possible to distinguish a principled and rigorous formulation for the crime of aggression.\textsuperscript{168}

Retributivists such as Immanuel Kant have stressed the uncompromising demands of justice above all else.\textsuperscript{169} The guiding principle of this rationale is that the initial evil committed by the criminal must be turned on the actor.\textsuperscript{170} Thus, the retributivist emphasizes two corresponding requirements: society is under a duty to exact justice and the punishment must be proportional to the crime.\textsuperscript{171} The failure to punish the wrongdoer is a dereliction of duty that inculpates all of society.\textsuperscript{172} In the famous formulation of Kant:

Even if a Civil Society resolved to dissolve itself . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.\textsuperscript{173}

According to this deontological view of crime and punishment, individuals guilty of the crime of aggression must be prosecuted in whichever State they may be found.\textsuperscript{174} Retributivists would have little patience for political impunity merely because the individual is the

\textsuperscript{165} See Working Group Report, \textit{supra} note 103, para. 75.
\textsuperscript{166} See Fletcher, \textit{supra} note 24, at 698.
\textsuperscript{167} See Greenawalt, \textit{supra} note 23, at 347.
\textsuperscript{168} See id. at 346.
\textsuperscript{169} See \textit{Kant}, \textit{supra} note 27, 196–97.
\textsuperscript{170} See id. at 196.
\textsuperscript{172} See \textit{id.} at 347; see also \textit{Kant}, \textit{supra} note 27, at 198.
\textsuperscript{173} \textit{Kant}, \textit{supra} note 27, at 198.
\textsuperscript{174} See \textit{id.}
national of one of the Permanent Members of the Security Council.\footnote{See id. at 195–96; see also Trahan, supra note 13, at 460.} This consideration would seem to support a very liberal triggering mechanism that provides the widest possible jurisdiction.\footnote{See Kant, supra note 27, at 195–96; see also Working Group Report, supra note 103, para. 71.} Failure to trigger the jurisdiction of the Court would inculpate the entire international system for allowing the crime to go unpunished.\footnote{See Kant, supra note 27, at 195, 198.} Thus a “three power” or “all powers” approach would best satisfy the need for certain prosecution.\footnote{See Meron, supra note 6, at 14; Working Group Report, supra note 103, paras. 70, 71.}

However, the retributivist will also insist that punishment must be deserved—the just desert of the wrong-doer.\footnote{See Kant, supra note 27, at 195.} Political determinations of aggression made by the Security Council or the General Assembly have the potential to be influenced by considerations of self-interest, expediency, or jealousy.\footnote{See Paulus, supra note 11, at 20–21; Trahan, supra note 13, at 460–461.} This increases the likelihood that individuals will be prosecuted and punished without ever having committed a crime—an inexcusable abuse to the retributivist.\footnote{Kant, supra note 27, at 195.} Thus, the relatively apolitical courts would seem the best choice to avoid undeserved prosecution.\footnote{See id.; Working Group Report, supra note 103, para. 68.}

Utilitarians, however, such as Bentham and Mill, view punishment not as a duty or the exaction of a debt, but as a means to prevent future crimes.\footnote{See Greenawalt, supra note 23, at 351.} Individuals base their actions on whether it results in pain or pleasure and the chief end of society is to maximize the total happiness of the community.\footnote{Jeremy Bentham, Principles of Morals and Legislation, in The Utilitarians 7, 162 (1961); see also Greenawalt, supra note 23, at 350.} Since punishment and criminal trials are costly and reduce the overall happiness of society, they are only justified insofar as they may reduce the future incidence of crime and unhappiness.\footnote{See Bentham, supra note 184, at 166.} The utilitarian perspective of the trigger mechanism is thus somewhat conflicted.\footnote{See id.} A broader triggering mechanism—along the lines of the three power model—would result in a maximum degree of jurisdiction.\footnote{See Greenawalt, supra note 23, at 351.} This is a negative in the sense that it may result in unnecessary prosecutions that are painful for in-
individuals and—more importantly—politically costly for states.\(^\text{188}\) The broader triggering mechanism of the three power model, for example, may encourage more prosecutions than are absolutely necessary to deter aggression.\(^\text{189}\) Furthermore, by inviting political tensions into the international system, a broad triggering approach may well erode support for international institutions generally, thus countering any positive effects of deterrence.\(^\text{190}\) In this respect, the utilitarian perspective would appear to support the least costly, most politically acceptable approach: i.e., determinations made exclusively by the Security Council.\(^\text{191}\) Able to protect themselves and their allies through the use of the veto, the permanent members of the Council will ensure that prosecutions proceed only when they do not pose any significant extrinsic cost to the system.\(^\text{192}\)

However, according to the utilitarian perspective, the broader triggering mechanism is also a positive outcome because it maximizes the certainty of punishment for crimes, thus providing the most efficacious deterrent to would-be aggressors.\(^\text{193}\) The narrower model, triggering prosecutions based only on an Article 39 determination of the Security Council, would inject a degree of uncertainty and impunity into the system as each permanent member of the Council would be perceived as acting to shield its own citizens and those of its allies.\(^\text{194}\) Would-be criminals would be invited to seek allies on the Council, precipitating the kinds of cat and mouse games that have plagued the Security Council in the post-Cold War era.\(^\text{195}\) Deterrence will be most effective if criminals are reasonably certain that they cannot escape the Court’s jurisdiction through political maneuvering.\(^\text{196}\) Following this rationale, the triggering mechanism should be vested as broadly as possible, providing maximum accountability.\(^\text{197}\) Thus, the pre-determination should not be vested solely in the Security Council, but should be made by any of the U.N. organs.\(^\text{198}\)

\(^{188}\) See Bentham, supra note 184, at 166.

\(^{189}\) See id.

\(^{190}\) See id.; see also Paulus, supra note 11, at 34.

\(^{191}\) See Paulus, supra note 11, at 34–35.

\(^{192}\) See id. at 24; see also Meron, supra note 6, at 13.

\(^{193}\) See Bentham, supra note 184, at 172–73; Ferencz, supra note 7, at 342; see also Rubin, supra note 18, at 42.

\(^{194}\) Paulus, supra note 11, at 21–22.

\(^{195}\) See, e.g. Saddam defies the UN, again, Economist, Nov. 8, 1997, at 47.

\(^{196}\) See Ferencz, supra note 7, at 342; see also David J. Scheffer, International Judicial Intervention, Foreign Pol’y, Mar. 22, 1996, at 34.

\(^{197}\) See Bentham, supra note 184, at 172.

\(^{198}\) See id.
With regard to the definition of the crime, the utilitarian argues that a broader definition of the crime will not only prevent the clear cases of aggression, but will deter borderline cases as well. A strict definition of the crime will merely enable bad actors to conform their conduct to the strict requirements of the law, while contravening its spirit. A broader definition capable of incorporating the margins of the crime will deter more bad behavior. As Lord Simon wrote, “those who choose in such situations to sail as close as possible to the wind inevitably run some risk.”

However, in addition to deterring blameworthy acts, a broader definition may also deter positive action. States may be less likely to commit peacekeepers, intervene in humanitarian disasters, or defend themselves against apparent threats if they perceive a risk of subsequently being labeled as aggressors.

Furthermore, one of the many utilities cited for the criminal law is its value as an expressive vehicle. It thus serves a number of purposes in affirming a shared moral code, in denouncing bad behavior, and in inculcating positive mores and habits. According to this rationale, the criminal law must serve some expressive purpose. But a criminal law that imprecisely defines the crime fails to identify or affirm any shared value.

A retributivist would approach the question of definition from the requirement of notice. Would-be wrong-doers must have adequate notice that their contemplated actions violate a social norm. Failure to define the crime with adequate specificity criminalizes acts that are otherwise lawful and condemns law-conforming citizens who

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199 See Trahan, supra note 13, at 456; see also Nash v. United States, 229 U.S. 373, 377 (1913) (“[T]he law is full of instances where a man’s fate depends on his estimating rightly ... some matter of degree.”).

200 See Trahan, supra note 13, at 456.

201 See id.


203 See Dawson, supra note 19, at 443.

204 See id.


206 See Johannes Andenaes, General Prevention—Illusion or Reality, 43 J. Crim. L., Criminology & Police Sci. 176, 179–80 (1952); see also Ferencz, supra note 7, at 358.

207 See Andenaes, supra note 206.

208 See id.


210 See Trahan, supra note 13, at 456; see also Morales, 527 U.S. at 56.
have inadvertently crossed the line.\textsuperscript{211} While this principle of criminal law also serves a utilitarian goal—limiting the discretion of courts and enforcers\textsuperscript{212}—its primary concern is the indefensibility of punishing individuals who have not made morally blameworthy choices.\textsuperscript{213} Thus, domestic courts have traditionally required a sufficient degree of specificity in the description of a crime.\textsuperscript{214} Without a morally blameworthy act, retributivists would deny the right of society to exact any retribution, even if it were to serve as a deterrent to others.\textsuperscript{215} Despite the preference of the Working Group for a general definition of the crime,\textsuperscript{216} this rationale would seem to support a narrower definition, stating clearly the nature and gravity of the prohibited acts.\textsuperscript{217}

However, the retributive rationale focuses on the blameworthiness of the act and not on any artificial notion of technical specificity.\textsuperscript{218} Acts that are clearly blameworthy are punishable—indeed must be punished—even if they are not spelled out in minute detail or foreseen by the courts.\textsuperscript{219} This concern with punishing criminally blameworthy acts would appear to suggest a flexibility of definition.\textsuperscript{220} For example, the specificity of the clearly listed acts of Resolution 3314 provides the requisite notice to would-be aggressors.\textsuperscript{221} Leaving the list open-ended so that evolving forms of the crime could be included—either by treaty or by prospective declaration of the ICJ—would provide the flexibility to capture evolving forms of aggression.\textsuperscript{222}

By considering the crime of aggression in the light of both the utilitarian and retributivist rationales it becomes apparent that the initial determination of aggression must be vested broadly enough to maximize deterrence, yet narrowly enough to protect states from politicized prosecution.\textsuperscript{223} The ICJ is the ideal trigger.\textsuperscript{224} Unlike the two

\begin{footnotes}
\footnotetext[211]{See \textit{e.g.}, Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).}
\footnotetext[212]{See Alan C. Michaels, \textit{“Rationales” of Criminal Law Then and Now: For a Judgmental Descriptivism}, 100 \textit{Colum. L. Rev.} 54, 72–73 (2000).}
\footnotetext[213]{See \textit{Kant}, \textit{supra} note 27, at 195.}
\footnotetext[214]{See \textit{Morales}, 527 U.S. at 56.}
\footnotetext[215]{\textit{Kant}, \textit{supra} note 27, at 195–96.}
\footnotetext[216]{\textit{Working Group Report}, \textit{supra} note 103, para. 75.}
\footnotetext[217]{See \textit{Trahan}, \textit{supra} note 13, at 456.}
\footnotetext[218]{See \textit{Greenawalt}, \textit{supra} note 23, at 347; \textit{see also} Shaw v. Director of Public Prosecutions [1962] A.C. 220, 268 (Eng.)(decision of Viscout Simonds) (arguing for the broad power of the common law courts to punish crime, even where the act is not specifically outlawed).}
\footnotetext[219]{See \textit{Kant}, \textit{supra} note 27, at 195.}
\footnotetext[220]{\textit{See id.; Trahan}, \textit{supra} note 13, at 456.}
\footnotetext[221]{\textit{Trah\text{an}}, \textit{supra} note 13, at 456.}
\footnotetext[222]{See \textit{id.} at 457.}
\footnotetext[223]{See \textit{Meron}, \textit{supra} note 6, at 13; \textit{Scheffer}, \textit{supra} note 196; \textit{see also} \textit{Greenawalt}, \textit{supra} note 23, at 347.}
\end{footnotes}
political organs of the U.N. it is able to offer reasoned and demonstra-
bly apolitical decisions.\textsuperscript{225} And unlike the ICC itself it is an appropriate
and indisputably competent forum to handle questions of a systemic
international nature.\textsuperscript{226} In order to ensure the fairest jurisdictional
reach, the ICJ opinion can, consistent with the U.N. Charter, itself be
triggered by a request from either the Security Council or the General
Assembly.\textsuperscript{227} This comports with both the utilitarian goal of maximizing
deterrence and also the retributivist goal of minimizing impunity.\textsuperscript{228}

In order to comply with statutory requirements and the apparent
direction of the U.N. Charter, the Security Council should be vested
with the primary responsibility for determining when aggression has
occurred.\textsuperscript{229} However, if the Council proves unable to act, the General
Assembly should be able to assume its duties.\textsuperscript{230} Both the Security
Council and the General Assembly—by proxy—could either make the
determination or refer the issue, as a procedural matter, to the ICJ.\textsuperscript{231}
There is no sound justification for making the determination of an ex-
ternal body binding on the ICC and the prosecution should itself be
required to establish the act of aggression.\textsuperscript{232} However, since the ICJ
offers a thorough discussion of the facts and reasoning of its decisions,
a judicial referral may provide persuasive reasoning useful to the prose-
cution.\textsuperscript{233}

The two rationales additionally provide some guidance in formu-
lating a justifiable definition of aggression.\textsuperscript{234} Retributivist principles
require specificity in order to provide adequate notice to would-be
aggressors that they are in danger of violating international criminal
laws.\textsuperscript{235} Utilitarian analysis adds the value of deterring bad actors who
would exploit a rules-based definition by the creation of a more flexi-
ble standard.\textsuperscript{236} Thus a specific definition, such as Resolution 3314,
with an open-ended list of illustrative acts would provide both the required notice and maintain the flexibility necessary to meet evolving forms of aggression. A prospective declaration by the ICJ that a particular act is aggressive would both deter similar conduct in the future and enjoin the actor from continued violation.

**Conclusion**

The crime of aggression is currently included in the jurisdiction of the International Criminal Court, an increasingly relevant and useful institution in the international community. The Court’s jurisdiction over aggression, however, will only become effective once the member parties of the Court are able to agree on a definition of the crime. Among questions related to the problem, the Working Group on the Definition of Aggression has identified two main conceptual difficulties in reaching an accord: how the Court will know that aggression has occurred between states, and how the definition describes the crime. The Working Group has already identified a number of options for a definition and offered thoughtful debate on both questions. But international legal theorists have yet to analyze the potential crime in the light of the traditional justifications for criminal law. Analyzing the Working Group’s options in the light of utilitarian and retributivist principles yields a useful framework for analysis and offers helpful suggestions towards a principled solution. Allowing both the General Assembly and the Security Council to request an ICJ advisory opinion on the question of whether aggression has taken place accords with both the retributivist principles of accountability as well as utilitarian principles of deterrence and safety from political prosecution. Defining the crime specifically and providing an open-ended list of illustrative acts provides both the prerequisite moral guidelines of the retributivist as well as the flexibility to deter new and evolving forms of aggression.

While it is yet unclear how well the crime may deter the act, the definition of the crime will almost certainly have a profound impact on international law itself. A working definition of aggression will assert more than the mere criminality of the act; it will assert affirmatively, for the first time, that war is no longer an acceptable extension of statecraft, that nations are not powerless to punish, and that—even in the murky legality of the world order—the rule of law will not tolerate impunity for those who bring the world to the brink of war.

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238 See, *e.g.*, Keeler v. Superior Court, 470 P.2d 617, 639 (Cal. 1970).
BREACHING THE GREAT FIREWALL: CHINA’S INTERNET CENSORSHIP AND THE QUEST FOR FREEDOM OF EXPRESSION IN A CONNECTED WORLD

Christopher Stevenson*

Abstract: In the final days of 2005, Microsoft Corporation made international headlines when it removed the site of a Beijing researcher from its blog hosting service. Soon, other instances of U.S. companies assisting in China’s internet censorship emerged. These revelations generated outrage among commentators and legislators and led to calls for action. This Note examines the methods of internet censorship employed by China and other nations, and explores the assistance that U.S. companies have provided to these nations. It analyzes the liability issues facing these companies in light of existing case law and statutory solutions proposed in the U.S. Congress. It then proposes a novel combination of existing legislative proposals, recommendations from the Electronic Frontier Foundation, and international cooperation as the best way to address the problem of internet censorship.

Introduction

During the final days of December 2005, Microsoft Corporation, a U.S. company, removed the site of Beijing blogger Zhao Jing from its MSN Spaces service. The move might have gone unnoticed by major media sources but for the fact that Zhao was a research assistant in the Beijing bureau of the New York Times. Instead of fading away, the story broke in the U.S. media in January of 2006.

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2 Barboza & Zeller, supra note 1.
Other instances of U.S. companies assisting China’s censorship efforts soon made headlines. The story of Shi Tao, a Chinese citizen sentenced to a ten year prison term for e-mailing a “state secret,” caused a great deal of outrage when it was discovered that Yahoo! had provided the Chinese government with information linking the e-mail to the IP address of Shi’s computer. In the midst of this turmoil, Internet giant Google announced that it was starting Google.cn, a new search engine service hosted in China. This new search engine would not include the blogging or e-mail capabilities of Google.com and would comply with Chinese government restrictions that censor any material deemed illegal or inappropriate.

Appalled by what they saw as blatant violations of human rights, members of the U.S. Congress convened hearings in Washington D.C. on February 15, 2006. Present were representatives from Microsoft, Cisco Systems, Google, and Yahoo!, as well as spokespersons from international watchdog and human rights groups such as Reporters Without Borders and Radio Free Asia. Lawmakers lambasted the U.S. based Internet companies for their cooperation with the repressive Chinese censorship regime. Representative Tom Lantos (D)-CA asked the representatives how their corporate executives could sleep at night and Representative Christopher Smith (R)-NJ compared the companies’ activities to those of businesses that worked with the Nazi regime during World War II. The following day, Representative Smith introduced

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6 David Barboza, *Version of Google in China Won’t Offer E-mail or Blogs*, N.Y. TIMES, Jan. 25, 2006, at C3.

7 Id.


9 Ctr. for Democracy and Tech.—Censorship, http://www.cdt.org/international/censorship/ (last visited May 5, 2007) (containing statements of these hearing participants).


the “Global Online Freedom Act of 2006” that will, if passed, proscribe most of the censorship being conducted by companies such as Google.\textsuperscript{12}

These hearings, and the outrage expressed by legislators, reporters, and Internet experts are only the latest salvos in the battle for online freedom of expression.\textsuperscript{13} Legislators, scholars, and the Internet community have struggled for years to find a solution to the problem of governmental Internet restrictions in China and other countries and the apparent aid that U.S. companies have provided in the enforcement of those restrictions.\textsuperscript{14} If the Internet is to remain a safe forum for the free and open exchange of ideas, lawmakers and the Internet community must work together to prevent repressive censorship.

Part I of this Note begins by exploring the history of Internet censorship laws. It then focuses on China’s laws and its intricate system of information restriction known as “The Great Firewall of China.” Finally, it examines the role U.S. companies have played in supporting these censorship regimes. Part II addresses the legal uncertainty surrounding the liability of U.S. companies that violate the laws of foreign countries and discusses two pieces of legislation, the Global Information Freedom Act and the new Global Online Freedom Act, which Congress has proposed as possible solutions to the problem. Part III examines the shortcomings of the Global Online Freedom Act and discusses how a combination of aspects of the Global Information Freedom Act, suggestions from the Electronic Frontier Foundation, and increased global cooperation is the best way to address this problem.

I. Background

For much of the 1990s, the Internet was seen as a great advance in promoting freedom of expression throughout the world.\textsuperscript{15} It was assumed that the free flow of information would lead to freer socie-
ties. Unfortunately, the Internet has not been a liberating force as expected. Governments that wish to restrict their citizens’ access to certain information have proven remarkably adept at being able to do so—often with the help of U.S. companies. To understand fully China’s rationale for restricting information and the elaborate ends to which it and other countries will go to enforce their restrictions, it is useful to begin with a look at the laws and methods they employ.

A. A Brief History of Internet Censorship

China is by no means the only country censoring Internet content. Many forms of restriction exist in many countries.

1. Censorship by Laws

Some countries have employed their restrictions simply through laws preventing the display of materials deemed inappropriate. One of the earliest attempts at instituting this kind of censorship regime came, interestingly enough, from the United States. In addition to prohibiting the transmission of obscene material and child pornography, the “Communications Decency Act of 1996” (CDA) attempted to criminalize the communication of “indecent” and “patently offensive” content to any person under 18 years of age. The “patently offensive” and “indecent” material restrictions were immediately challenged and eventually struck down by the United States Supreme Court as overly vague and broad restrictions on freedom of speech.

Congress tried again in 1998 by enacting the “Child Online Protection Act” (COPA). This law had the same effect but was more narrowly tailored than the CDA and was not found to be unconstitutional.

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16 Lee, supra note 15.
17 See Goldsmith & Wu, supra note 15, at 41; Lee supra note 15.
19 See, e.g., Kalathil & Taylor, supra note 18, at 107–15 (detailing restrictions in China, Cuba, Singapore, Vietnam, Burma, the United Arab Emirates, Saudi Arabia, and Egypt).
20 See id.
23 Reno v. ACLU, 521 U.S. at 849.
on its face. Applying strict scrutiny, however, the Court ruled that the government still had the burden of proving that the restrictions in COPA were no more restrictive than necessary to advance the stated goal of protecting children from harm. The government is still collecting data in an attempt to show that personal web filters—the Court’s suggested alternative to COPA—are not as effective as COPA’s provisions.

A similar law has met with far more success in Australia. The “Broadcasting Services Amendment (Online Services) Act” was passed in 1999 and regulates Internet content based on classifications made by a Classification Review Board: R18 (information deemed likely to be disturbing or harmful to persons under 18 years of age), X18 (nonviolent sexually explicit material involving consenting adults), and RC (refused classification). Material in the X18 and RC categories is prohibited content regardless of whether or not it is only available to adults. Material classified as R18 is allowed, but only on sites that restrict minors’ access via a government approved adult verification system.

Instead of searching for prohibited content, the government relies on public complaints to the Australian Communications and Media Authority (ACMA) to identify prohibited or potentially prohibited content. When prohibited or potentially prohibited material is discovered on Australian servers, the ACMA issues take-down notices to Internet Service Providers (ISPs) and Internet Content Hosts. When the prohibited content is hosted outside the country, the ACMA simply notifies approved makers of filtering and blocking software to add the content to their blacklists.

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29 Id.
31 Id.
32 Australian BSA, supra note 28, at sched. 5 pt. 4. The ACMA does, however, have the authority to initiate investigations on its own. Id.
33 Censorship Laws in Australia, supra note 30.
34 Id.
2. Censorship by Active Filtering

In contrast to the reactive systems used in Australia and proposed in the United States, the Internet censorship systems employed by many other countries rely on much more proactive filtering of Internet content.35 Saudi Arabia is a good example of such a country.36 In fact, it did not even allow public access to the Internet until it had established sufficient filtering technology in 1999.37 The country is unusually open about its filtering mechanisms and policies.38 The Internet Services Unit (ISU), which controls Internet access, maintains information about the filtering policy and mechanisms on its website.39 The current prohibited content is described by a 2001 resolution of the Council of Ministers.40 The ISU also maintains records of which users are online and which sites they access.41

In practice, the Saudi system seems focused on particular areas of government and religious concern.42 Testing by the OpenNet Initiative revealed extensive Saudi filtering of sites dealing with pornography, drugs, gambling, and religious conversion.43 Sites containing tools to circumvent filtering technologies are also blocked.44 In contrast, sites dealing with homosexuality, religion, and even alcohol are relatively accessible.45

Other countries have introduced their own filtering systems.46 Iran and Burma are notable for their extremely strict systems.47 China
is clearly not the only offender in the Internet world, but it is the most sophisticated and effective.48

B. China’s Great Firewall

The term “Great Firewall of China” is somewhat of a misnomer. Rather than using a single web filtering mechanism, China employees a complex system of laws, technology, and human oversight that effectively controls the web content available to users within China.49 In the 1990s, few people would have believed this kind of control possible.50 Many scholars believed that the world-wide expansion of the Internet would lead to the demise of repressive regimes as people around the world gained access to new ideas and information.51 China was also worried about the impact of the Internet and structured its system accordingly.52

1. Legal Restrictions

Chinese Internet regulations on providers of Internet services are promulgated and enforced by a number of overlapping agencies.53 The first major law to regulate Internet content was the 1996 “Interim Provisions Governing Management of Computer Information Networks in the People’s Republic of China Connecting to the International Network.”54 The provisions were amended and enhanced in 1998 and 2000 by the “Provisions for the Implementation of the Interim Provisions Governing Management of Computer Information Networks in the People’s Republic of China,” State Council Order No. 292, “Measures on Internet Information Services” (IIS Measures), and the “Decision of

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50 See Goldsmith & Wu, supra note 15, at 40; Lee, supra note 15.
51 See Kalathil & Boas, supra note 18, at 1–2, 14; Goldsmith & Wu, supra note 15, at 40; Lee, supra note 15.
52 See Hu, supra note 14.
53 See Internet Filtering in China, supra note 48, at 8, app. 2.
the Standing Committee of the National People’s Congress on Preserving Computer Network Security.”\(^{55}\) Taken as a whole, these regulations prevent Internet users and ISPs from displaying any content not approved by the government.\(^{56}\) This includes content that divulges state secrets, subverts the government, opposes the State’s policy on religion, advocates cults or feudal superstitions, disrupts the social order, or shows obscenity, pornography, gambling, or violence.\(^{57}\)

All Internet information services must be licensed (if commercial) or registered with the authorities (if private).\(^{58}\) If they provide news, publishing, bulletin board, or “other services,” site operators must record the IP address and domain name information of all content provided.\(^{59}\) ISPs must record and retain for sixty days the amount of time users spend online, their account numbers, their IP addresses, and their dial-up numbers.\(^{60}\) If the site operator or ISP discovers prohibited information, it must be removed immediately, and records of the event must be retained and communicated to the appropriate authorities.\(^{61}\)

The latest addition to this string of regulations came in 2005 and deals specifically with providers of “Internet news information services.”\(^{62}\) The term “Internet news” is defined broadly as “information on current and political affairs, which includes reports and comments on social public affairs such as those relating to politics, economy, military and diplomatic affairs and sudden events of society.”\(^{63}\) The regulation applies to anyone who publishes news information on websites, provides bulletin board system services on current and political topics, or transmits information on current and political topics to the public.\(^{64}\) The new law contains all of the content restrictions and information retention of earlier laws, but adds the requirement that any


\(^{56}\) Decisions, supra note 55, art. 2–4; IIS Measures, supra note 55, art. 15.

\(^{57}\) Decisions, supra note 55, art. 2–4; IIS Measures, supra note 55, art. 15.

\(^{58}\) IIS Measures, supra note 55, art. 7.

\(^{59}\) Id. art. 14.

\(^{60}\) Id.

\(^{61}\) Id.


\(^{63}\) Id.

\(^{64}\) Id.
news about current and political affairs must be the information released by official government news agencies. Moreover, it is widely believed that the law is written broadly enough to encompass bloggers who post non-approved information.

Providers of electronic messaging and bulletin board services must abide by their own set of restrictive rules. Under the “Administration of Internet Electronic Messaging Provisions,” all must obtain government approval before offering those services and must post their permit number, their messaging rules, and warnings about the liability they and users bear for the posting of restricted information. Censors must be employed to ensure that the content of bulletin boards and chat room messages comply with government restrictions.

These electronic messaging restrictions were recently augmented by new regulations designed to prevent spam. The new provisions require users to enter true information about their identities when subscribing for e-mail addresses and mandate that the e-mail provider retain all sign-on and access records for sixty days.

Operators of cybercafés are also singled out for special treatment under Chinese law. Following a deadly cybercafé fire in 2002, the government imposed strict safety and licensing requirements for café owners. Included in the new regulations were provisions prohibiting operators and users from using the cafés to access any of the categories of materials deemed inappropriate by the laws detailed above. Technical measures must be installed to detect users who access illegal information and those users must be reported to the authorities. The creden-
tials of all users must be checked and registered, along with that user’s log-on information. These records must be kept for 60 days.

Finally, the Chinese government has created a voluntary “Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry” as well as a system by which citizens can report sites containing illegal information. The Pledge requires the Internet company to monitor the information published by users, refrain from producing any prohibited information, remove harmful information, and refrain from establishing links to websites that contain harmful information. The reporting system consists of a website through which Internet users can inform government censors of any illegal content they discover online.

2. Technical Barriers

China backs up its extensive system of regulations with extensive technical control of its network. Development of the Chinese Internet system has been controlled by the government from its inception. In 1996, early in the network’s development, the government group in charge of development decided to create a two-tiered system of Internet access. One tier is available for the public. ISPs connect to this tier and provide access services to their customers. This first tier, however, is only able to access the greater Internet outside the country through a second tier of the network. This second tier is completely controlled by the State and thus provides government control over the borders between the Chinese Internet and the rest of

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76 Id. art. 23.
77 Id.
79 Pledge, supra note 78, art. 9.
80 See Cyberspace Regulator Meets the Press, supra note 78.
81 See INTERNET FILTERING IN CHINA, supra note 48, at 3.
82 See KALATHIL AND BOAS, supra note 18, at 21.
83 Id.
84 Id.
85 See id.
the world. This plan has effectively made the entire country’s network into one big intranet.

The Chinese network backbone is comprised of some of the most powerful and advanced network technology available in the world. The OpenNet Initiative’s 2004–05 study of Chinese Internet filtering reported that the Cisco 12000 series routers used in the network’s backbone have dynamic packet filtering capabilities that allow the application of up to 750,000 bi-directional packet filtering rules. It also appears that the government is using firewall and other network security software to selectively block data.

With all of this technology at work, China’s ability to censor information is extensive. OpenNet Initiative’s testing revealed that websites with information about Falun Gong, Tibetan Independence, and Taiwan were consistently inaccessible from within the country. It found evidence of the interception of e-mail containing sensitive data, although this technology seemed less mature—filtering success largely depended on the language and character encoding used in the messages. Messages submitted to online chat rooms were frequently excluded or removed if they contained sensitive information, and web sites that contained sensitive topics were excluded from the search results on China’s largest search engines. Clearly the country has enormous censorship ability and does not hesitate to use it.

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86 Id.
87 Newbold, supra note 54, at 511. An intranet is an Internet-like network that is separated from the rest of the Internet. Most organizations with computer networks employ an intranet design to facilitate intra-organization information sharing and to protect their computers from users on the rest of the Internet. See Webopedia, Intranet, http://www.webopedia.com/TERM/i/intranet.html (last visited May 6, 2007).
88 Internet Filtering in China, supra note 48, at 7. Dynamic packet filtering technology enables an Internet router or firewall to examine individual TCP/IP data packets as they pass through the device and exclude those that the router administrator has identified in the router’s “rules.” These rules can restrict entire Internet protocols or packets coming from or going to specified Internet domains, IP addresses, or URLs containing certain words or phrases. See Webopedia, Stateful Inspection, http://www.webopedia.com/TERM/S/stateful_inspection.html (last visited May 7, 2007).
89 See Internet Filtering in China, supra note 48, at 23–27.
90 See id. at 23.
91 See id. at 23–27.
92 See id. at 46–47.
93 See id. at 49, 51.
94 See Internet Filtering in China, supra note 48, at 52.
C. Foreign Assistance

Although China certainly has capable engineers within its own country, experts agree that it could not have developed its system of monitoring and filtering without the help of Western hardware and software companies. In fact, many countries that filter Internet content have taken advantage of products from U.S. companies. Testing by the OpenNet Initiative has shown that SmartFilter software made by the U.S. company Secure Computing is used by government filters in Tunisia, Iran, the United Arab Emirates, and Saudi Arabia.

As noted above, routers and switches manufactured by Silicon Valley based Cisco Systems (Cisco) comprise a large part of the Chinese Internet backbone and Internet filtering technology. By one estimate, the company earns $500 million per year in China. California computer giant Sun Microsystems and web-monitoring software maker Websense have also been implicated in sales of web filtering and monitoring technology to China.

In the past few years, Internet companies have entered the Chinese playing field and have recently made headlines for the assistance they have provided to the censorship program. Well before the enactment of the “Rules on the Administration of Internet News Information Services,” U.S. companies providing e-mail, SMS, or Internet portal services such as Yahoo!, Microsoft, and Google, were already participating in the censorship of information.

In mid-2002, Yahoo! signed China’s “Public Pledge on Self-discipline for the Chinese Internet Industry” and voluntarily agreed

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95 See Lee, supra note 15; MacKinnon, supra note 14.
97 Bambauer, supra note 48, at 56.
98 See id., at 56; Internet Filtering in China, supra note 48, at 7.
99 See Internet Filtering in China, supra note 48, at 7.
100 Hu, supra note 14.
to refrain from establishing links to prohibited websites or disseminating “harmful information.” Since that time, Yahoo!’s search engine has returned restricted search results to Chinese users without informing them of any limitations.

In 2005, soon after the enactment of the “Rules on the Administration of Internet News Information Services,” Yahoo! provided the Chinese government with information that linked the IP address of Shi Tao’s computer to an e-mail the Chinese government found objectionable. The “state secret” leaked in the e-mail was information about government reporting guidelines for the commemoration of the fifteenth anniversary of the Tiananmen Square massacre. Shi was sentenced to a ten year prison term for releasing it.

Google initially resisted the Chinese censorship system and China blocked access to the site in early 2002. Although it continued to resist censorship, Google was eventually unblocked. In 2004, however, Google began to provide a version of Google news to China that excluded links to publications the Chinese government found objectionable.

On January 24, 2006, Google announced its own limited Internet search engine, Google.cn, that would be hosted in China. The site’s search results only display links to sites to which the Chinese government does not object. Although the search engine informs users that the search results have been censored, its technology actually excludes more information than the Yahoo! site and local Chinese search engines. To avoid collecting user-identifying information, the site lacks the e-mail and blogging capabilities of Google.com and

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103 See Newbold, supra note 54, at 511, 513.
105 Kerstetter, supra note 5.
106 Id.
107 Id.
110 Malinowski Testimony, supra note 102.
111 Barboza, supra note 6.
112 Id.
also lacks the caching functionality that would allow Chinese users access to unblocked cached versions of prohibited websites.\footnote{Barboza, \textit{supra} note 6, at C3; Malinowski Testimony, \textit{supra} note 102.}

Microsoft has also helped censor Internet information.\footnote{Barboza & Zeller, \textit{supra} note 1, at C3; Donoghue, \textit{supra} note 1.} When its online blog service, MSN Spaces, became available in China in May 2005 through servers in Shanghai, users discovered that the use of the words democracy, freedom, human rights, or demonstration in their postings returned an error message indicating that their “item contained forbidden speech.”\footnote{Donoghue, \textit{supra} note 1; Malinowski Testimony, \textit{supra} note 102.}

In December 2005, Microsoft removed the blog of Zhao Jing from MSN Spaces at the request of the Chinese government.\footnote{Barboza & Zeller, \textit{supra} note 1, at C3; Donoghue, \textit{supra} note 1.} Zhao, also known as Michael Anti on his blog, was well known to the Chinese government.\footnote{Hamish McDonald, \textit{China’s Web Censors Struggle to Muzzle Free-spirited Bloggers, Sydney Morning Herald} (Austl.), Dec. 23, 2005, available at http://smh.com.au/news/technology/chinas-web-censors-struggle-to-muzzle-freespirited-bloggers/2005/12/22/1135032135897.html.} He had frequently posted political commentaries by Chinese writers and had already been blocked for posting a letter critical of the editor of the China Youth Daily in a blog.\footnote{Donoghue, \textit{supra} note 1; Malinowski Testimony, \textit{supra} note 102.} Microsoft not only removed Zhao’s blog, but likely did so from a server within the United States.\footnote{Donoghue, \textit{supra} note 1.} That a U.S. company would comply with censorship demands and remove content from U.S.-hosted servers finally angered Congress into taking action.\footnote{Id.}

\section*{II. Discussion}

Over the past several years, developments in law have left open the question of whether U.S. Internet companies can be held liable for violations of foreign Internet censorship laws.\footnote{See, e.g., Broache & McCullagh, \textit{supra} note 120; MacKinnon, \textit{supra} note 14.} At the same time, there have been legislative attempts to define the U.S. government’s role in this area and limit the assistance U.S. companies can provide to Internet censoring countries.\footnote{See Marc H. Greenberg, \textit{A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market}, 18 BERKELEY TECH. L.J. 1191, 1205 (2003).}
A. Internet Jurisdiction

U.S. companies argue that they must comply with foreign governments’ demands if they want to conduct business in foreign countries. 124 Their compliance, however, may stem more from a desire to avoid liability for violation of foreign laws. 125 Such a fear is not unfounded after two French groups brought a lawsuit against Internet giant Yahoo!. 126

In April 2000, *La Ligue Contre Le Racisme et L’Antisemitisme* (LICRA) sent a cease and desist letter to Yahoo!’s Santa Clara, California headquarters which threatened legal action unless the Internet company stopped providing access to sites selling Nazi paraphernalia. 127 Five days later, LICRA commenced such a lawsuit against Yahoo! and Yahoo! France in the Tribunal de Grande Instance de Paris. 128 The suit was joined by *L’Union des Etudiants Juifs de France* (UEJF). 129 The suit claimed that Yahoo! had violated section R645–2 of the French Penal Code, which bans the exhibition of Nazi paraphernalia for sale and prohibits French citizens from purchasing or possessing such material. 130 Although Yahoo! operated a subsidiary in France, fr.yahoo.com, which removed such content, other Yahoo! servers hosted auction sites on which these materials were offered for sale. 131 These sites were accessible to anyone, including users in France, who entered Yahoo! through its main portal www.yahoo.com. 132

The French court issued an interim order on May 22, which required Yahoo! to “take all necessary measures to dissuade and render impossible any access via yahoo.com to the auction service for Nazi merchandize as well as to any other site or service that may be construed as an apology for Nazism or contesting the reality of Nazi crimes,” and imposed monetary penalties for each day of delay or

124 See MacKinnon, supra note 14.
125 See Goldsmith & Wu, supra note 15, at 44.
126 See id. at 40.
127 Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme (Yahoo IV), 433 F.3d 1199, 1202 (9th Cir. 2006).
128 Id.
129 Id.
130 Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme (Yahoo III), 379 F.3d 1120, 1121 (9th Cir. 2004).
131 See id. at 1121–22.
132 Yahoo IV, 433 F.3d at 1202; Yahoo III, 379 F.3d at 1121–22.
confirmed violation.\textsuperscript{133} Yahoo! objected to this order, contending that there was no technical solution that would allow it to fully comply.\textsuperscript{134}

After commissioning an expert study of the situation, the court found that it was possible to determine a web surfer’s country of origin with about seventy percent certainty.\textsuperscript{135} Making particular reference to the fact that it appeared that Yahoo! was already using some of this technology, the court upheld its earlier interim order on November 6, 2000.\textsuperscript{136} This new interim order kept the monetary penalties of the May order intact and added a provision requiring fr.yahoo.com to display a warning to surfers before they were able to link to www.yahoo.com.\textsuperscript{137} The decision, however, declared that Yahoo! France, through actions taken after the initial order, had already “complied in large measure with the spirit and letter” of the May 22 order.\textsuperscript{138}

The court did not impose the penalties of the order and LICRA and UEJS did not attempt to convince the court to do so.\textsuperscript{139} Instead, the two groups claimed that they would only seek to have the penalties imposed if Yahoo! “revert[ed] to their old ways and violat[ed] French law.”\textsuperscript{140} At the time of this writing, neither plaintiff has sought enforcement of the penalties.

In late 2000, Yahoo! filed suit in federal district court in California.\textsuperscript{141} The suit sought a declaratory judgment that the interim orders were not enforceable in the United States.\textsuperscript{142} That court determined it had personal jurisdiction over the French groups and later determined enforcement of the orders was not mandatory and that a U.S. court does not have to give effect to foreign judicial orders if those orders violate American public policy or fundamental interests.\textsuperscript{143} The

\begin{footnotesize}
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\item [133] \textit{Yahoo IV}, 433 F.3d at 1202–03.
\item [134] \textit{Id.} at 1203.
\item [135] \textit{Id.}; UEJF et LICRA v. Yahoo et Yahoo France, [Interim Court Order of Nov. 20, 2000], Paris Tribunal de Grande Instance, No. RG: 00/05308, \textit{available at} http://www.cdt.org/speech/international/001120yahoofrance.pdf; Goldsmith and Wu, \textit{supra} note 15, at 43.
\item [136] UEJF et LICRA, No. RG 00/05308. The expert report noted that web users visiting www.yahoo.com from computers located within France were greeted with French advertising. \textit{Id.}
\item [137] \textit{Id.}
\item [138] \textit{Yahoo IV}, 433 F.3d at 1204.
\item [139] \textit{Id.}
\item [140] \textit{Id.}
\item [141] Greenberg, \textit{supra} note 122, at 1227–28.
\item [142] \textit{Yahoo IV}, 433 F.3d at 1204.
\item [143] Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme (Yahoo II), 169 F. Supp. 2d 1181, 1189 (N.D.Cal. 2001); Yahoo!, Inc. v. La Ligue Contre Le Racisme et
French orders were found to violate Yahoo!’s fundamental rights under the First Amendment and were declared unenforceable.\textsuperscript{144}

LICRA and UEJF appealed to the Ninth Circuit and a three justice panel found that the district court erred in finding personal jurisdiction over the two organizations.\textsuperscript{145} The court granted rehearing en banc and reversed the panel’s holding of lack of jurisdiction.\textsuperscript{146} The case was dismissed, however, because, of the eleven judges, a three judge plurality did not find Yahoo!’s First Amendment claim ripe for adjudication and another three judges found no personal jurisdiction.\textsuperscript{147}

In short, the French injunction against Yahoo! remains in effect and the question remains unanswered whether it or any other order forcing a U.S. company to comply with foreign Internet censorship laws is a violation of the First Amendment.\textsuperscript{148} It appears that an actual attempt by a foreign government to impose damages would not be enforced, but injunctions that restrict the kinds of information foreign web surfers can access from those countries may be enforceable.\textsuperscript{149} Google, Microsoft, and the other companies doing business in China may be forced, by threat of injunction, to comply with Chinese court orders limiting the kind of content available to Chinese surfers.\textsuperscript{150}

B. Global Internet Freedom Act

The “Global Internet Freedom Act” (GIFA) was first introduced in the House and Senate in October 2002.\textsuperscript{151} Nearly identical versions of the bill were introduced in 2003, 2005, and 2006, but not one has been enacted.\textsuperscript{152} The purpose of the Act, as stated in its most recent iteration, is “to develop and deploy technologies to defeat ‘Internet jam-
If passed, it would establish the Office of Global Internet Freedom (OGIF) within the International Broadcasting Bureau (IBB), which would work to develop and implement a comprehensive global strategy to combat the state-sponsored and state-directed “Internet-jamming” and user persecution conducted by repressive foreign governments.

The idea behind the Act stems from the historical activities of the U.S. Foreign Information Service (FIS).

The FIS, now the IBB, was created in 1941 and began broadcasting the Voice of America (VOA) during World War II. For much of its existence, a large portion of VOA’s operating funds have been spent on technologies to prevent repressive governments from jamming the transmission of news from VOA, Radio Free Asia, and other news sources.

The IBB already deploys some technology to counter Internet-jamming, but the Act would significantly increase the volume of this activity. At the date of the latest introduction of the Act, the VOA and Radio Free Asia had spent only $3 million on Internet counter-jamming technology.

The Act would establish a budget of $50 million for the OGIF. The OGIF would be specifically authorized to work with the private sector to acquire and implement the technology necessary to defeat Internet blocking and censorship.

C. Global Online Freedom Act

The latest legislative response to Internet censorship is the “Global Online Freedom Act of 2006” (GOFA). This bill was introduced in February 2006 at the close of the House Subcommittee hearings on Chinese Internet censorship. It incorporates elements of GIFA, but extends that bill to include stiff civil and criminal penal-
ties for U.S. companies that offer assistance to governments that censor, block, monitor, or restrict access to the Internet.\footnote{See H.R. 4780 § 207.}

Like GIFA, GOFA would create an Office of Global Internet Freedom to develop and implement a global strategy to counter Internet blocking and censoring by foreign governments.\footnote{Id. § 104(a).} Unlike GIFA, the GOFA OGIF would be part of the Department of State and would ultimately report to the President.\footnote{Id. § 104(a)–(b).} It would develop a strategy to combat Internet censorship, but would also work with the President to create an annual report of countries that restrict Internet access and the methods by which that restriction is achieved.\footnote{Id. § 104(b)(3).}

With information supplied by the OGIF, the President would determine which countries were directly or indirectly responsible for restricting Internet freedom and would provide an annual list of designated “Internet-restricting” countries to Congress.\footnote{Id. § 105.} The GOFA would initially designate Burma, China, Iran, North Korea, Tunisia, Uzbekistan, and Vietnam to this list.\footnote{H.R. 4780 § 105(a)(3).}

U.S. companies could not host a search engine in a country designated Internet-restricting.\footnote{Id. § 201.} They could not alter the search results of their U.S.-hosted search engines to satisfy the laws of foreign countries, and they would have to provide the OGIF with any and all terms and parameters that any foreign country uses to filter its results.\footnote{Id. § 203.} Content hosts could restrict access to content at the request of foreign Internet-restricting governments, but would be required to provide a list of any content removed or blocked to the OGIF.\footnote{Id. § 205.} Finally, no U.S. business could provide any official from an Internet-restricting country with information that could personally identify a particular user of that company’s services.\footnote{Id. § 206(a).}

The GOFA would create a private right of action in U.S. courts for citizens of Internet-restricting countries whose personal information is revealed to their governments.\footnote{H.R. 4780 § 206(b).} These civil suits could result
in damage awards of up to $2 million.\footnote{Id. § 207(a).} Additional criminal penalties would result in fines against companies and up to five years imprisonment for individuals convicted of information disclosure.\footnote{Id. § 207(b).}

The Attorney General could bring civil suits for violation of the search engine and content host provisions of the Act, which could result in penalties of up to $10,000.\footnote{Id. § 207(a)(2).} Individuals violating these provisions would face criminal fines and up to one year in prison.\footnote{Id. § 207(b)(2).}

Finally, the GOFA would establish controls on exports and licensing of hardware and software.\footnote{H.R. 4780 § 301.} The Act would require the promulgation of regulations preventing the knowing export of items used in Internet censorship to “Internet-restricting” countries.\footnote{Id. § 301.}

III. Analysis

While at first glance the GOFA appears to address the issue of Internet censorship head-on and punish those companies that assist Internet-restricting governments,\footnote{See supra, Part II(C).} upon closer inspection several troubling details arise. A thoughtful analysis reveals that the bill, if enacted as is, would go too far in its policing efforts while at the same time do too little to curb international Internet censorship.

A. Excessive Provisions

The first troubling aspect of GOFA lies in its definition of a “United States Business.”\footnote{See H.R. 4780 § 3(11).} The bill includes companies that are incorporated in the United States, subsidiaries of those companies, and “any issuer of a security registered pursuant to section 12 of the Securities Exchange Act of 1934.”\footnote{Id.} This means that any company listed on one of the U.S. security exchanges could be found liable in a U.S. court.\footnote{Chris Myrick, FOCUS-Proposed ‘Online Freedom Act’ May Hurt US and US-Listed China Firms, FORBES.COM, Feb. 16, 2006, http://www.forbes.com/afxnewslimited/feeds/afx/2006/02/16/afx2531410.html.} Tom Online, Sohu.com, and Baidu.com, the leading Chinese search engine, are all Chinese companies listed on the NASDAQ exchange.
and could face U.S. lawsuits if the GOFA is enacted.\textsuperscript{185} Whether any damages in such suits could be enforced is questionable after \textit{Yahoo! v. LICRA}, but the uncertainty would be damaging to those companies and their U.S. financial backers.\textsuperscript{186} Faced with the choice of breaking either local laws or U.S. laws, these companies would simply de-list themselves from NASDAQ and join either the Shanghai exchange or the Hong Kong Bourse.\textsuperscript{187} This would do nothing to curb censorship and would hurt the NASDAQ and its U.S. investors.\textsuperscript{188}

Another cause for concern is the section of the Act that forces U.S. companies to report any content they have been asked to block or remove from their servers.\textsuperscript{189} While a case can be made that the U.S. government needs to know what kind of content is censored in order to create effective countermeasures to Internet restrictions, this provision goes too far.\textsuperscript{190} By obtaining the content of blogs, e-mail, and websites blocked by foreign countries, OGIF would obtain exactly the kind of personal information about Internet users that it would work to prevent other countries from learning.\textsuperscript{191} This result could lead to distrust of the OGIF and the U.S. government.\textsuperscript{192}

A third area in which the GOFA causes concern is its list of Internet-restricting countries.\textsuperscript{193} The OGIF would compile data about countries’ Internet censorship activities and consult with private companies and non-government organizations for assistance, but it would be the President, with no discernable guidelines to follow, who would decide which countries were on the list.\textsuperscript{194} The implications of this system are troubling.

First, businesses selling products to foreign countries would be hurt financially.\textsuperscript{195} Not only would they be prevented from selling any products that have the potential to aid in censorship to Internet-restricting countries, but they might also be unable to enter into multi-year contracts to supply these products or support services to any coun-

\textsuperscript{185} Id.
\textsuperscript{186} See id.
\textsuperscript{187} Id.
\textsuperscript{188} See id.
\textsuperscript{189} See H.R. 4780 § 205.
\textsuperscript{190} See America’s Censors, supra note 163.
\textsuperscript{191} See id.
\textsuperscript{192} See id.
\textsuperscript{193} See H.R. 4780 § 105.
\textsuperscript{194} See id. §§ 104, 105.
\textsuperscript{195} See id. § 301.
try. With the possibility of arbitrary inclusion of any country to the list, a company could find itself breaking the law by fulfilling its contract obligations in a country that was not on the list at the time of the agreement, but was included later.

Second, the list has the potential to be politically motivated. The interests of goodwill or positive foreign relations could easily trump the goal of reducing Internet censorship abroad. Indeed the makeup of the initial list of Internet-restricting countries already reveals this sort of political favoritism. The initial countries include communist regimes and countries hostile to the United States, while other countries that have strict Internet censorship laws, but are financially important to the United States, such as Saudi Arabia and the United Arab Emirates, are conspicuously absent.

B. Ineffective Measures

While the GOFA is excessive in many of its provisions, it still manages to be relatively ineffective at preventing Internet blocking and censorship. If the goal of the Act is to promote free speech and the free exchange of information, portions of the Bill must be changed.

The first area in which the Act is ineffective is in its definition of which companies are subject to liability. As discussed above, the Bill is over-inclusive in that it includes companies that do no business within the United States. At the same time, it is under-inclusive in that some U.S. companies that have already caused harm would not be affected. Yahoo!, because of its disclosure of the identity of Shi Tao, is arguably the worst offender of any company that has assisted Chinese censorship. Yahoo!, however, would not be held liable for its transgressions under the GOFA. Yahoo.cn, the entity that revealed the information to Chinese government authorities, is a subsidiary of Yahoo!, but the Chinese company Alibaba.com owns sixty percent of that subsidiary. Alibaba is not listed on a U.S. securities

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196 See id.
197 See H.R. 4780 § 105(a)(3).
198 See id.
199 See supra Part III(A).
200 See H.R. 4780 § 3(11).
201 See Myrick, supra note 183.
202 See id.
203 See Gunther, supra note 104; America’s Censors, supra note 163.
204 See Myrick, supra note 184.
205 Id.
exchange and, by virtue of this controlling interest, both it and Yahoo! would escape liability.\footnote{206}

Another way the GOFA fails to achieve its goal of promoting global freedom of information is through its method of designating “Internet-restricting” countries.\footnote{207} As discussed above, companies would only be prohibited from assisting countries designated as Internet-restricting by the President.\footnote{208} The initial list of countries already has glaring omissions and it is likely that countries that censor will remain excluded from the list either for political reasons or because their censorship is simply not as egregious as that of other offenders.\footnote{209} While the GOFA will have some effect on China and other countries that make the list, the citizens of restricting countries not included will have no recourse for any harm.\footnote{210}

In sum, the GOFA, while touted as a bill to promote and protect global Internet freedom, has several troubling provisions and does little to actually promote free world-wide information exchange.\footnote{211} It seems designed to be more a form of punishment for U.S. companies that have already assisted Internet-censoring governments than a real attempt to prevent censorship altogether.\footnote{212} More work must be done and more thought put into this Bill.\footnote{213}

C. What Can Be Done?

If the GOFA fails to accomplish its goal of preventing censorship, what can be done? In an open letter to the members of the Subcommittee on Africa, Global Human Rights, and International Operations, at the beginning of that committee’s February hearings, the Electronic Frontier Foundation (EFF) laid out a number of topics for the committee to discuss with the Internet companies in attendance.\footnote{214} When combined with several provisions of the Global Information Freedom

\begin{footnotesize}
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\item \footnote{206}{See id.}
\item \footnote{207}{See H.R. 4780 § 105.}
\item \footnote{208}{Id. § 301.}
\item \footnote{209}{See supra, Part III(A).}
\item \footnote{210}{See H.R. 4780 § 207.}
\item \footnote{211}{See supra Part III(A) and (B).}
\item \footnote{212}{See, e.g., Myrick, supra note 184.}
\item \footnote{213}{See, e.g., America’s Censors, supra note 163.}
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Act, these topics should serve as the foundation for an effective new U.S. response to the problem of Internet censorship.\textsuperscript{215}

1. Limit Data Collection and Data Retention

Information that could personally identify a particular user of Internet services is the most dangerous information Internet companies possess.\textsuperscript{216} In countries such as China, even the IP address of a computer accessing restricted information may be enough to identify the person operating that computer.\textsuperscript{217} To the extent possible, Internet service providers should refrain from collecting and storing any such information that could personally identify individual users.\textsuperscript{218}

In the search engine and content provider contexts, this could be as simple as storing information in a way that completely dissociates the address information from the search conducted or content accessed.\textsuperscript{219} In e-mail and instant messaging situations, the goal should be to collect as little information as is necessary to provide the service and to retain that information for as little time as possible.\textsuperscript{220} If the information needed can easily identify a particular user, that information should be stored on servers outside of the restricting country.\textsuperscript{221}

2. Incident Collection and Reporting

Internet companies should collect and publish statistics on the amount of information they have been asked to block or remove from their servers and the reasons given for these requests.\textsuperscript{222} They should specifically note the particular law enforcement agency that requested the censorship and the law, if any, that was used to justify the action.\textsuperscript{223}

If a search engine is required to censor search results or prevent access to sites, it should inform users that information has been ex-
cluded from the results.\textsuperscript{224} It should provide the URL for the excluded information even if that URL is unreachable from within the restricting country.\textsuperscript{225} Information about such censorship requests should be collected, stored, and published.\textsuperscript{226}

Collecting this data will provide valuable information for entities working to counteract the censorship activities of foreign countries and will provide the international community with evidence of the repressive nature of censorship regimes.\textsuperscript{227} While the GOFA advocates this kind of collection, it only does so with countries on the Internet-restricting list and also requires collection of the specific content censored.\textsuperscript{228} A better approach is to protect the rights and identities of individual Internet users by collecting this data from all countries, but reporting only the types of information excluded and the reasons for exclusion.\textsuperscript{229}

3. Do not do Direct Business with Forces of State Oppression

The EFF next recommends that U.S. companies be prohibited from intentionally providing support and assistance to those who would restrict the free exchange of information on the Internet.\textsuperscript{230} This does not mean, as the GOFA suggests, that companies should be barred from selling any products that can be used for such purposes to foreign countries.\textsuperscript{231} Many of those products, such as Internet routers and firewall software, have legitimate purposes in protecting networks from hackers and preventing the spread of Internet viruses.\textsuperscript{232} Preventing their use for legitimate purposes will only harm world-wide Internet users.\textsuperscript{233}

With that said, there is still no need for U.S. companies to offer knowing assistance to foreign officials specifically requesting assistance

\begin{footnotes}
\item[224] See Reporters Without Borders, \textit{supra} note 109.
\item[225] See, e.g., Gunther, \textit{supra} note 104.
\item[226] See Reporters Without Borders, \textit{supra} note 109.
\item[227] See id.
\item[228] See H.R. 4780 §§ 203, 205.
\item[229] See Code of Conduct, \textit{supra} note 214; America’s Censors, \textit{supra} note 163.
\item[230] See Code of Conduct, \textit{supra} note 214; America’s Censors, \textit{supra} note 163.
\item[231] See H.R. 4780 § 301.
\item[232] See Code of Conduct, \textit{supra} note 214.
\end{footnotes}
with Internet censorship. Companies should offer assistance for the legitimate uses of their products and no more. Granted, this will be a difficult line to draw, as legitimate purposes and censorship uses often overlap. Still, to the extent such a provision helps change the mindset of U.S. corporations, it will benefit the fight against Internet censorship.

4. Offer Opportunistic Encryption with Internet Services

The availability of opportunistic encryption is a crucial step in the promotion of free speech and free information exchange online. Most online services transmit easily intercepted unencrypted plain-text data over the Internet. Encryption provides a relatively easy way to make the same information unreadable and should be added to protect the content of e-mail messages, instant messaging, and search requests and results whenever possible.

The potential problem with offering encryption lies in U.S. export controls that bar encryption exports to some foreign countries. However, China and Saudi Arabia are not included in the list of embargoed countries. The use of encryption would therefore aid the citizens of two of the strictest Internet censoring regimes, and serious consideration should be given to modifying the export rules to allow at least export strength encryption to be exported to embargoed countries.

5. Support Technologies that Innovate Around Censorship and Surveillance

The final EFF suggestion is that governments and private companies should invest in and develop technologies to circumvent the censorship efforts of foreign governments. By creating the OGIF within

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234 See id.
235 See id.
236 See id.
237 See Code of Conduct, supra note 214.
238 Id.
239 Id.
243 See id.
the IBB, the GIFA not only creates a government office with that responsibility, but also puts control of that office in the hands of the organization that has spent decades developing and operating anti-radio jamming technologies for Radio Free America, Radio Free Europe, and Radio Free Asia. Enacting this GIFA provision would provide substantial funding for cooperation with private companies in the development and deployment of technologies that would extend this anti-jamming mission to the Internet.

6. Penalties

Although neither the EFF nor the GIFA recommend penalties for U.S. companies that assist in Internet censorship, such penalties will be an important aspect of any legislation seeking to curb U.S. companies’ involvement in Internet censorship.

Unlike the broad-based penalties recommended by the GOFA that would affect foreign companies that are merely listed on U.S. securities exchanges, U.S. legislation should focus on penalizing only U.S. companies and the foreign subsidiaries in which those companies own a controlling share. Both civil and criminal remedies should be available against any such company or individual that reveals any information that could be used to identify users of their services. These penalties would not only provide companies with a legitimate reason to refuse foreign demands for such information, but would also give this legislation the bite it needs to be an effective deterrent for U.S. companies.

7. International Cooperation

Finally, the United States cannot solve the problem of Internet censorship by simply enacting domestic legislation. It may be able to curb some activities of U.S. companies, but many foreign companies, including those within Internet-restricting countries, are ready and able to step into any void left by lessened U.S. competition.

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244 See H.R. 4741 §§ 4(e), 2(8), 109th Cong. (2006).
245 See id. § 4(e).
246 See H.R. 4780 § 207.
247 See, Myrick, supra note 184.
248 See H.R. 4780 §§ 207(a)(1), 207(a)(2).
249 See id.
250 See America’s Censors, supra note 163.
The United States must therefore work with the United Nations and foreign countries that share its desire to promote free expression to address the problem on a global scale and apply pressure to all nations that restrict the free exchange of information.\textsuperscript{252} The GIFA already contains sections that call for a U.N. resolution and increased pressure from the international community.\textsuperscript{253} Both of these provisions should be included in any U.S. legislation.\textsuperscript{254}

III. Conclusion

Global Internet censorship is a problem that affects all those who cherish freedom of expression and the free exchange of ideas. The United States and other countries that value these rights need to work together to provide the appropriate pressures and incentives to open the Internet for all to use without restriction.

At the same time, countries pushing for censorship reform need to maintain the moral high ground. It is somewhat hypocritical, for example, for the United States to propose legislation preventing companies from providing user information to foreign governments at the same time that it presses those same companies to provide it with information about the Internet searches of U.S. Internet users.\textsuperscript{255} Likewise, it should not criticize other countries for monitoring e-mail and instant messaging communications while it takes measures to make that same information more easily accessible for officials in this country.\textsuperscript{256} The Internet should remain a conduit for free expression of all information, not that information approved by any one government. Only be achieved with global understanding and cooperation can this goal be achieved.

\textsuperscript{252} See H.R. 4741 §§ 3(6), 5(2).
\textsuperscript{253} See id.
\textsuperscript{254} See id.; America’s Censors, supra note 163.
\textsuperscript{255} See Mohammed, supra note 27.